IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

KENTUCKY SPEEDWAY, LLC	:	CASE NO:
Plaintiff,	:	1:06-mc-00203-KAJ
v.	:	
NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., ET AL.,	:	
Defendants.	:	

APPENDIX – VOLUME 2 OF 2
TO BRIEF OF NON-PARTY DOVER MOTORSPORTS, INC.
(1) IN SUPPORT OF DOVER'S MOTION TO STRIKE AND
(2) IN OPPOSITION TO PLAINTIFF'S MOTION TO
COMPEL AGAINST THIRD PARTY DOVER MOTORSPORTS INC.

App. No.	Document
73-148	Transcript of Oral Argument in the Kentucky Action Before Judge William O. Bertelsman on January 12, 2006.
149-167	Declaration of Klaus M. Belohoubek, Esquire.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

KENTUCKY SPEEDWAY, LLC, : Docket No. CV 05-138
:
Plaintiff, : Covington, Kentucky
: January 12, 2006
versus : 1:30 p.m.
:
NATIONAL ASSOCIATION OF STOCK CAR :
AUTO RACING, INC., et al., :
:
Defendants. :

- - -

TRANSCRIPT OF ORAL ARGUMENT
BEFORE JUDGE WILLIAM O. BERTELSMAN,
UNITED STATES DISTRICT COURT JUDGE

- - -

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App. 73

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Proceedings recorded by mechanical stenography, transcripted via computer-aided transcription.

(Proceedings commenced in chambers at 1:30 p.m.)

THE COURT: I hope everybody had good holidays.

MR. SINGER: Yes, thank you.

THE COURT: Okay. Do you want to give the court reporter your appearances? Let's start with plaintiff.

MR. CHESLEY: Stanley Chesley for the plaintiff.

MR. SUSMAN: Steve Susman, plaintiff.

MR. NELSON: Justin Nelson for the plaintiff.

MS. STILZ: Fay Stilz for the plaintiff.

MR. GUILFOYLE: Mark Guilfoyle, plaintiff.

MR. CRAIG: Rob Craig for Defendant International Speedway Corp.

MR. WADE: Guy Wade for International Speedway Corp.

MR. DONSON: Jack Donson for International Speedway Corp.

MR. ACKER: Rodney Acker for International Speedway Corp.

MR. SINGER: Stuart Singer for NASCAR.

THE COURT: All right. Everybody who's going to talk got a seat? Okay.

All right. We're here on several motions, and I guess the best way to do it is start with that group of motions that goes to whether the amended complaint states a cause of action. So who wants to be heard on that first?

MR. SINGER: Your Honor, I'm Stuart Singer on behalf of

NASCAR, and I'm prepared to argue on the standing issues --

THE COURT: Okay.

MR. SINGER: -- which we have briefed. There are two distinct claims that plaintiff has asserted here for standing purposes. They're set forth, we think, in paragraph 2 of the amended complaint.

The first is a claim that the plaintiff, as a result of alleged anticompetitive conduct, would have been the recipient of a NASCAR NEXTEL Cup race sanction. And the second is a claim that, based on some rules not very clearly identified but referenced mainly with respect to point systems and rules regarding testing cars, but for those rules, the Plaintiff Kentucky Speedway would have been in position to and would have competed as an independent against NASCAR.

We think both of those claims are deficient for lack of antitrust injury and antitrust standing. If the Court will permit me, I'd like to start with three general points.

THE COURT: Okay.

MR. SINGER: The first is that, as set forth in our reply brief, the cases that we rely upon are cases that have ruled upon 12(b) motions to dismiss. They have either been cases where that motion has been granted or, in one case, where the Sixth Circuit reversed the denial of a motion to dismiss. And they've dealt with antitrust standing. So we think this is a very appropriate juncture at a case to consider the issue of

whether the plaintiff's theory of the case is sufficient to go forward.

THE COURT: I've got a number of questions here. I was going to let you proceed a little further, but you've touched on the first one. And that is, in an antitrust case, is a motion to dismiss based on a different standard than in other cases?

MR. SINGER: We don't think the standard changes.

THE COURT: All right. Well, then the complaint should be construed very liberally; and if, under any construction of the complaint, there might be grounds for relief, the motion should be denied.

MR. SINGER: We think the general rule applies, but we think that the Court -- what the Courts have done, and the reason you have a lot of cases that have dismissed antitrust complaints for lack of antitrust injury, is that there has to be a theory of antitrust injury set forth in the complaint. That's not a matter of fact. That's a matter generally of applying the law. And that is why cases in other courts have specifically dismissed claims from disappointed applicants for sports franchises, because that theory is deficient as a matter of antitrust law.

The second general point I would make would be that, particularly in the Sixth Circuit, the issue of antitrust injury and antitrust standing has been recognized as being very fundamental.

THE COURT: That's true.

MR. SINGER: Sixth Circuit said, I believe, in the Highpoint v. Hewlett-Packard case that this is at the very center of antitrust law. It determines whether a particular case is glued to the purpose of antitrust law. It's not a technicality. And in several cases, the Sixth Circuit has expressed -- in fact, recognized that this Circuit has been reasonably aggressive in getting rid of cases for lack of antitrust injury, for the lack of a claim of injury to competition, rather than an injury to a competitor, and, critically, that the nature of the injury that the plaintiff relies upon is as a result of what makes that anticompetitive.

And that is -- and we'll go into this in more detail -- the essential flaw here: That you have an injury to a potential competitor, but basically to a potential applicant for a franchise, but not to competition, and that, to the extent they allege things about competition in the market, when you get down to what they're complaining about, it's their lack of a franchise to participate in NASCAR's racing.

THE COURT: Well, this touches on my second question: Is what the complaint alleges that the market is premium or NEXTEL -- same thing apparently -- premium or NEXTEL races as one market, and it says in the second market it is hosting those races. Okay. Do you agree with that definition of the market, or do you have some other market you'd like to suggest?

MR. SINGER: For purposes of this motion, we've

accepted that definition.

THE COURT: Okay.

MR. SINGER: If the case were to go forward, we would quarrel with that definition.

THE COURT: Okay.

MR. SINGER: We think it's too narrow. But for these purposes, particularly since we're on a motion to dismiss, that's the type of thing we feel like we do accept.

THE COURT: Okay. He alleges further that NASCAR engaged in a conspiracy at least with a codefendant, one other coconspirator, and perhaps others, to achieve a monopoly in that market.

MR. SINGER: It's a general allegation --

THE COURT: Or to attempt to monopolize that market.

MR. SINGER: They've made that general allegation.

THE COURT: And further, that they've engaged in predatory activity to achieve the scheme of monopolization.

MR. SINGER: They have made a number of conclusiary allegations with our activity. I think that the complaint is strikingly deficient in linking that to the alleged lack of a franchise in Kentucky to be part of the number of races that are run under NEXTEL Cup Series; and that for purposes of this hearing, we can accept all of that and the Court can accept all those, I think, as one common territory.

May have been Areeda said you can, for purposes of

looking at antitrust standing, accept the defendant's conduct and focus instead on the plaintiff's position. And that's what really we've done here. And that's why you don't have to dispute the allegations that plaintiff is making about NASCAR and ISC's conduct to conclude that, nevertheless, this plaintiff lacks standing when it comes in and asks for a -- to be credentialed as a NASCAR-sanctioned race for the NEXTEL Cup Series, and then separately, the issue that the activity that they have alleged has prevented Kentucky Speedway from competing as an independent.

And, in fact, the -- all the cases -- and there's been a lot of dispute in the briefs about the cases, but what's remarkable about that, Your Honor, is that this is not a situation where Kentucky Speedway has a set of cases going in their direction and where NASCAR has a set of cases going in our direction. Within this area of disappointed applicants are sports franchises, as well as outside of sports, when people are asking for credentials at a hospital, to become a member of a trade association, those cases are all going our way, and Kentucky Speedway is trying to draw distinctions and quibble with them. And we think that that is ultimately unsuccessful.

And if I might address more specifically with respect to the first of the two areas, where they say, We are entitled to be a holder of a NEXTEL Cup sanction. They don't make clear whether they're expecting this to be a new race that NASCAR has to add to the schedule, whether it's to be taken away from some

unnamed place where a race exists now. They make the conclusion, we would have gotten a race, and there's all this anticompetitive activity.

Well, this is the type of claim that's been brought time and time again in Federal Courts, invoking antitrust laws by NFL applicants for an NFL team franchise --

THE COURT: How can all this be resolved on the allegations in the complaint? Analyzing the market can be -- I'm no antitrust expert by any means, but I've been reading up on it, and here's one, one of the recent ones from the Sixth Circuit, Spirit Airlines v. Northwest Airlines, 429 F.3d 190. In there, they take an airport, and they don't say -- and two airlines competing in an airport -- Detroit I think it was -- and they don't say the market is the whole airport. They don't even say the market is the whole terminal. They say the market is one route between Detroit and Boston, and that in that one, while Northwest might not have had a monopoly in the whole airport, they have a monopoly on that one route. As I understand in the complaint, they're saying you've got a monopoly on that one race. They say more than that.

MR. SINGER: Well, I think the different is, in the Spirit Airlines v. Northwest Airlines, you're dealing with competitors.

THE COURT: That was my next question. Who's the buyer, who's the seller, or are they competitors? Is NASCAR

buying use of the track, or is the track buying the races?

MR. SINGER: Well, I think it's a vertical relationship between racetracks and NASCAR where it's a contractual relationship where benefits are flowing in both directions. There's certainly a sharing of television proceeds. There's a sanction going from NASCAR to the track to hold the race.

But what they are not is competitors in the sense that Northwest Airlines and Spirit Airlines is a case where it clearly is antitrust standing in the spirit, in the sense, that Spirit Airlines is a competitor of Northwest.

THE COURT: Well, they say they're a competitor of the codefendant.

MR. SINGER: Well, they say that -- and I know Mr. Atkins will have more to say about that, but they're certainly not a competitor of NASCAR, and we don't think that they're a competitor with respect to the claims they've raised here of ISC because it's not like they're competing to get one of ISC's tracks or anything like that. But certainly with respect to NASCAR, Kentucky Speedway is not a competitor. A competitor would be a rival sanctioning body. They're not a rival sanctioning body that sanctions other races.

A competitor, they allege in their second claim, is someone who would want to run an independent race. Well, there's nothing -- and they have to admit this -- in the agreements that they have with NASCAR, the Busch and the Craftsman Series

agreements, which prevents them from running an independent race in competition with NASCAR. And they acknowledge that.

So what they are arguing instead is that they would have competed but for some point rules and some rules that deal with testing. And on that part of our argument, we say, first of all, that they haven't shown that they have the preparedness to compete as an independent race.

THE COURT: That's the complaint.

MR. SINGER: Well, the complaint in that regard has a --

THE COURT: How are you going to show all that in the complaint? I think they make a general allegation along those lines.

MR. SINGER: They do. In paragraph 30 --

THE COURT: But that would be pretty detailed. They'd be pleading a hundred pages of evidence, and then they'd be hearing from me.

MR. SINGER: Well, on paragraph 30, they say absent the various alleged anticompetitive action, Kentucky Speedway would have competed by offering larger purses, et cetera.

Now, first of all, that part of the case is not a claim which gives them a right to a NASCAR NEXTEL Cup franchise. That is their second claim, which is that, but for those rules, they would have been able to compete as an independent. So at a minimum, the part of the case where they're seeking a NASCAR

NEXTEL Cup sanction should be dismissed.

On this other part, where they make this general allegation, we think you could dismiss that as being insufficient, but we think there's another alternative. And that is why we have said that the Court could convert this to a motion for summary judgment and have limited discovery with respect to that specific issue, because that specific issue --

THE COURT: What specific issue?

MR. SINGER: That issue would be, has Kentucky Speedway really taken the steps required by the cases to be in a position to compete as an independent with NASCAR and have they been prevented from doing so by these two rules which they've identified? They have not made any allegation, Your Honor, that they have tried to compete, that they've tried to run an independent race. They have not made any allegation that they tried to get NASCAR drivers but they've been unable to do so. They haven't made any allegation that there are no other drivers available who they can't get. No allegation about getting financing that's been unavailable, or anything else that the case law, which we've set forth in the briefs from various circuits, have said is necessary before someone just comes in and says, give us standing to say we were hurt, we would have competed, we would have entered this market.

That is a discrete issue. That is an issue which the Court, before opening this Court up to massive discovery, can

say, let the parties deal with that specific issue and let's see, even if they don't allege it, if there's any proof that would support that type of a claim. And that's essential for them to go forward on that claim.

Going back, if I might, to the first claim about being a holder of a NEXTEL Cup sanction, what does the plaintiff say about the cases we've cited? And there's a voluminous amount of case law on this, from the NFL to the National Hockey League, in basketball, let alone areas outside of sports where people who apply for this type of a sanction, this type of a franchise, Court say that is not antitrust injury.

They say two things. The first thing they say is that's different because those are leagues and NASCAR is not a league; NASCAR is a single entity. None of the cases say that that's important on the issue of antitrust injury. The cases talk about the league in trying to figure out whether the, per se, rule applies to concerted action or some rule of reason because different teams in a league need to work together. Nothing to do with the antitrust injury. And economically, it wouldn't, because the same rationale applies here. They're trying to get the benefits of a NASCAR sanction.

The complaint says there's too high ticket prices. Well, who does that go to? That revenue goes, in part, to NASCAR, but in large part to the sponsor of the race, people who hold those sanctions.

They allege, generally, TV has to pay a lot more than we think hypothetically should be the case. Well, who's the beneficiary of higher broadcast contracts? That's not just NASCAR; that's shared with the promotors.

They fall exactly within what these cases say when they say these are people who are trying to get the benefits of the very same antitrust, anticompetitive conduct that they're attacking. And that is not what the antitrust laws are for, and that's why they throw all these cases out of court, and generally at an early stage.

The second point which is argued by the plaintiffs is, they're not trying to join NASCAR; they're trying basically to reform it. They're trying to attack the entire industry and allege that the industry broadly is anticompetitive. Making that type of allegation doesn't change things. And, in fact, in a number of the cases -- and we point this out on page 6 of our reply brief -- dealt with similar allegations.

There was Murray against the National Football League in Eastern District of Pennsylvania where there, the issue was someone had an option agreement to acquire the New England Patriots and the league said, no, we're not going to let you do that. And they said, well, this is a result of an anticompetitive series of activities. And it says, "Although plaintiffs often state that the competitive process has been harmed by the adoption of certain NFL policies, they have failed

to link their failure to obtain an expansion franchise to NFL policies and to the competitive process that assertedly exists for the market for the sale of ownership interests in an NFL franchise." And they say, "Try as plaintiffs might to distinguish this case from Mid-South Grizzlies and a long line of cases which stand for the proposition that an unsuccessful applicant for a franchise has not suffered an antitrust injury, we do not find the distinction compelling."

You have the Seattle Totems Hockey Club v. The National Hockey League. This is a Ninth Circuit case. This dealt with the issue of a franchise and denial of a National Hockey League franchise.

THE COURT: Are those in your brief?

MR. SINGER: All these are in our brief.

THE COURT: Okay. I read them all, but focusing in on a few, the Sixth Circuit ones.

MR. SINGER: And there's Sixth Circuit cases we have cited, like Index Services.

THE COURT: We have two Sixth Circuit cases here within the last month. I don't want to say that they're inconsistent so let me ask you if you think they're inconsistent. And they could be because the panels work on them and they go in and they frequently don't see each other's work, and they come out about the same time. These came out about the same time, one November 9th, one November 2nd. But one is the one you cite,

Care Heating & Cooling, Judge Siler's case, and the other one is Spirit Airlines that I was referring to.

You rely heavily in your brief on Judge -- on the one that Judge Siler wrote, but does he not make an exception for monopolies? He says, "The vertical distribution restraints are to be tested under the rule of reason. Unlike many horizontal agreements such as Group Boymans, price cartels and monopolies, they're entirely void of redeeming competitive value.

Now, you're saying it's vertical. Some of the allegations in the complaint sound like they're saying it's horizontal. I'll ask them what they think, how they interpret their own complaint in a second. But they specifically make an exception for monopolies and boycotts. I don't know if there's a boycott here, but they're certainly alleging a monopoly and an attempt to monopolize.

MR. SINGER: First of all, Your Honor, the Northwest Airlines case is not a case that dealt with antitrust standing. It was a case that a summary --

THE COURT: It got as far as summary judgment, which implied they had standing. If they denied the summary judgment, they must have thought they had standing.

MR. SINGER: And we don't dispute that in a situation where you have a competitor. You have two airlines. You have Spirit Airlines suing Northwest Airlines. And the issue there, I think, was on the merits of the antitrust theory pled.

The issue with respect to Care Heating is significant because there, the Court did find there was a lack of antitrust injury, and there you had a situation where there was an allegation that the distributor had conspired with one of the -- with the manufacturer. So you had that element that would be --

THE COURT: Aren't they alleging that here? They're alleging one racetrack conspired with NASCAR.

MR. SINGER: They are. And that is why we think Care Heating was significant, because despite that allegation, the result in Care Heating was to find there was no antitrust injury.

THE COURT: But it makes an exception for a monopoly. And then under Spirit, they had the two airlines. I don't think they allege -- these were just head to head.

MR. SINGER: They were head to head.

THE COURT: Trying to get control of this route. I thought what was interesting with that case is they narrowed the market down to one route or two routes.

MR. SINGER: It's interesting, the airline industry.

THE COURT: The Supreme Court case said championship boxing matches are a market.

MR. SINGER: The market definitions issue will be interesting.

THE COURT: My problem is, I don't know if we can put it all in the complaint. You're not supposed to plead a lot of evidence.

MR. SINGER: We don't think that, with respect to the first part of their case, there's anything they could plead which would get around the problem that what they're seeking is a NEXTEL Cup sanction. And that means the theory of their case is, we're entitled to be part of the group which is allegedly engaged in anticompetitive conduct. We're entitled to get part of NASCAR's profits.

THE COURT: You and I have discussed the theory of the case. Maybe we ought to ask them about the theory of the case. You've covered your position pretty well.

MR. SINGER: I think the rest is --

MR. DONSON: And I would like to speak on behalf of International Speedway. We have separate grounds on the motion to dismiss.

THE COURT: Okay. Let me hear you. I was going to save the long arm until we got through with this.

MR. DONSON: No, no. Mr. Acker is going to address the long arm, but I'm going to address the antitrust aspect of it.

THE COURT: You guys divide it up, but I had to do it all. Go ahead.

MR. DONSON: Okay. And Your Honor, I have two broad points I'm going to make. One is, I have an additional antitrust injury argument that supplements Mr. Singer's argument and supports dismissal of the claim with respect to the NEXTEL Cup. And then going beyond the antitrust injury as to International

Speedway Corporation, our motion argues that the complaint fails to state a claim against International Speedway. Regardless of what happens on antitrust injury, regardless of what happens to the claim against NASCAR, International Speedway should be dismissed. So those are my two broad points.

THE COURT: Okay.

MR. DONSON: But I want to focus very closely on a line of Sixth Circuit cases, six cases out of the Sixth Circuit that established what's called the necessary predicate principle of antitrust standing. And Your Honor, I submit these cases absolutely require the dismissal of the claim with respect to the NEXTEL Cup.

And cases -- we've cited them all, Axis, Hodges, Valley Products, Watkins, CTUNIFY, and Care, a case you just referred to. There are six cases that have granted dismissal of antitrust claims in circumstances that I submit are identical to this case.

And let me start with a few principles that come out of these cases. First of all, of these six cases, five of them are 12(b)(6) dismissals. So the Sixth Circuit has said that antitrust injury is a threshold dispositive issue, and it can be addressed on the complaint, particularly in these circumstances.

Secondly, this is a --

THE COURT: Yet other cases say you should be reluctant to dismiss it on the complaint, depending on which way the Court is inclined, I think.

MR. DONSON: But you have to focus on this particular theory of dismissal. The Sixth Circuit had zero problem dismissing cases on 12(b)(6) based upon this theory.

The second point is, this is uniquely a Sixth Circuit line of cases. The Sixth Circuit created this necessary predicate principle. One of the cases cited, Cardizem, that they cite says that it's the Sixth Circuit's laws on the antitrust injury principle. So this is a unique line of cases to the Sixth Circuit. And what's being cited from other circuits has no bearing on this point.

And there are several other points before we get to how the doctrine applies. One addresses exactly what Your Honor has been raising. Your Honor said, well, they've alleged a conspiracy, they've alleged a monopoly, they've alleged markets, they've alleged a boycott. Well, Your Honor, if you look at these six cases, all of these cases assume an antitrust violation. They assume anticompetitive effects. And notwithstanding those assumptions -- and this is directly in those opinions -- they say, we will assume for purposes of this motion that this anticompetitive conduct occurred. Nonetheless, 12(b)(6) dismissal was granted because of the failure to allege antitrust injury, the failure to satisfy the necessary predicate test.

I want to make just a couple of other points on this before I explain the application of it. One is, is that the

plaintiff absolutely must satisfy this necessary predicate principle to go forward. The Axis case that we cite says that the case cannot go forward unless there is antitrust standing. The Valley Products case that we cite is one that Judge Nelson wrote, and he said, "This principle involves no balancing. It is not applied in selected cases. It is applied in all antitrust cases."

Another principle that comes out of these cases is that it applies to all of plaintiff's claims. The Axis case says it applies to a Section 4 claim for damages. That's the provision that gives standing for damages. It applies to a Section 16 case for injunctive relief. The Valley case says it applies to a Section 1 claim, the boycott, the conspiracy to restrain trade. Valley also applies it to a Section 2 claim, the monopoly, the conspiracy-to-monopolize claim. So these cases have complete application on a Rule 12(b)(6) motion.

Now, let me explain what the principle is. And I'm going to start with the Valley Products case that Judge Nelson wrote the opinion on. And in this case, one of the defendants was a franchisor of hotels. It was called Hospitality Franchise System, HFS. They franchise the Ramada Inns, the Days Inns.

THE COURT: Have you got the citation handy?

MR. DONSON: Yeah. It's 128 F.3d 928, and it was decided by Judge Nelson in 1997. And Your Honor, in this case, the franchisor of these hotels -- the franchisees bought

trademarked logo amenities for the hotels. They bought soap, they bought shampoo --

THE COURT: I think I heard that case.

MR. DONSON: -- with the hotel's logo on it. And there had been six of these suppliers' logoed amenities for these hotels. Well, the franchisor, HFS, entered into an agreement with two of those suppliers that they would be the sole suppliers to the franchised hotels; and one of the excluded suppliers sued, claiming that they were being excluded from the market, anticompetitive behavior, all the others were being excluded from the market, and that they were unable to sell logoed amenities to these franchised hotels.

And the Sixth Circuit dismissed on Rule 12(b)(6), and the analysis is exactly this, on the necessary predicate principle. The Sixth Circuit said that the injury to the logoed amenities supplier, the excluded supplier, flowed directly -- and those are the words of the Court, "flowed directly" -- from the decision of the franchisor, HFS, not to continue the plaintiff as a supplier of logoed amenities. And that was the necessary predicate to the exclusion of plaintiff; that the agreement between the --

THE COURT: I do recall that case now, but there was no allegation of anybody getting a monopoly.

MR. DONSON: Oh, yes, there was, Your Honor.

THE COURT: I don't think. Or at least what you're

talking about, it wouldn't involve a monopoly. It would just involve their decision not to --

MR. DONSON: Well, it involves expressly a Section 2 claim, and the monopoly is that these two suppliers jointly controlled the sale of the amenities to these franchisees. All other suppliers were excluded.

It clearly involves a claim of monopoly, but furthermore -- and I want to go back to the point because this is crystal clear in these cases -- the Court assumed a violation. It assumed there was a conspiracy in restraint of trade. It assumed there was a violation of Section 2, and they said that's for later; first we have to see whether the plaintiff satisfies the necessary predicate principle of antitrust injury. And Your Honor, Valley Products is only one of six cases in the Sixth Circuit --

THE COURT: Maybe we better figure out what exactly the complaint alleges. All right. It alleges a conspiracy between NASCAR and the other defendant, your client, to control this NEXTEL race. And, as I read it, it says further -- and we'll call on them to see if this is the right reading of it -- it says further, if they can't get the NEXTEL race, they want to try to get one of their own, but you guys have got all the drivers locked up by this point system you've got. And that's all part of an existing monopoly or an attempt to monopolize, and that it constitutes predatory conduct.

MR. DONSON: Well, Your Honor, let's --

THE COURT: And the cases you're talking about don't have any of that in it.

MR. DONSON: I disagree with you, respectively.

THE COURT: Okay. That's your prerogative.

MR. DONSON: If you look at the cases, there's clear allegations of an antitrust violation, and the assumption that there was a violation and there were anticompetitive effects. But let's look at some of these other six cases.

The Hodges case, which involved a shuttle service that wanted to shuttle passengers from the Nashville Airport to Opryland, and there was an allegation of a conspiracy among other shuttle operators in the market and Opryland to monopolize the market so that Opryland conducted all of the shuttle services.

So Hodges is a case where there is an allegation of a conspiracy, where there is a claim of monopoly to monopolize shuttle services to Opryland. The Court says, we'll assume all that's so, but there was not antitrust injury because the necessary predicate for the plaintiff's injury was the decision of Opryland to deny the plaintiff access to Opryland. Plaintiff could not bring its shuttles onto Opryland. That was the necessary predicate, not the alleged conspiracy.

The same is absolutely true in this case. The necessary predicate to plaintiff's injury, what plaintiff's injury directly flows from, is NASCAR's decision not to license

or not to provide NEXTEL Cup races to plaintiff. The conspiracy is secondary. The direct and immediate cause, the necessary predicate to plaintiff's injury, is NASCAR's decision to not grant NEXTEL Cup races to the plaintiff.

And I can go through the other cases, the Care case, which you cited. That's a -- the Train American Standard Care case that just was decided by the Sixth Circuit, that's a conspiracy case. And the claim was, is that the manufacturer, Train, conspired with a distributor to license only it and to not license the plaintiff. Again, assuming a violation doesn't matter. It was the decision not to license the plaintiff, not the conspiracy, that was the necessary predicate. And you can go through all of these cases.

In the CTUNIFY case we cited, they wanted to train users of NEXTEL equipment. That's what it had been doing. It claimed that there was an exclusive agreement, an unlawful agreement, between Nortel and another trainer to lock up the market, to exclude the plaintiff and to exclude everybody else. And the Sixth Circuit said, case dismissed, Rule 12(b)(6); there's no antitrust injury. The injury of plaintiff flows directly from Nortel's decision not to license plaintiff to train, just like this plaintiff's decision -- or injury flows directly from NASCAR's decision not to grant it NEXTEL Cup races, not from any conspiracy.

You know, I don't know that you want me to go through

the facts of more of these cases. I'm prepared to do so.

THE COURT: I'll go back and review them. If they were in your brief, I read them, but I've been working on this a while and it's been a couple weeks.

MR. DONSON: Well, all six of them, and five of them are 12(b)(6).

THE COURT: Are they in your brief?

MR. DONSON: Yes, Your Honor.

THE COURT: I'll go back and read them again.

MR. DONSON: Yes, Your Honor, they are. Okay. So that principle, Your Honor, we submit, requires dismissal of the claim with respect to the NEXTEL Cup Series.

Now, Your Honor, I want to -- while I have the floor, as I said, ISC, or International Speedway, has a little different situation than NASCAR. Our motion says that regardless of antitrust injury, regardless of whether this case goes forward against NASCAR, that International Speedway should be dismissed. And so I want to spend a few moments touching upon those points.

First of all, there are three claims against International Speedway in the complaint. Count 1 alleges a conspiracy to restrain trade. Count 2, in one of the paragraphs, 49, alleges that NASCAR and International Speedway conspired to monopolize. And so I'm going to start with those two claims.

Obviously, a predicate, a requirement, an essential element of those two claims, is a conspiracy between

International Speedway and NASCAR.

Now, Your Honor asked about what's the standard for pleading in an antitrust case. And the plaintiffs brought to Your Honor's attention by way of a supplemental filing the Twombly decision out of the Second Circuit in November -- it was in October of 2005. And I commend that decision to Your Honor. It's approximately a 20-page decision discussing what needs to be pled in an antitrust case. And frankly, it's a more thorough discussion than you will ordinarily find. And what the Twombly Court said is very, very instructive here. They said that the normal rules of Rule 8 pleading applies.

So first of all, all of plaintiff's claim about a lessened standard in antitrust cases and a reduced standard in antitrust cases, that's out.

THE COURT: They didn't say it was reduced. They just said it was the ordinary one; that you don't ordinarily dismiss something on the complaint unless it's patently frivolous.

MR. DONSON: Okay. Well, I read their briefs differently.

THE COURT: They said the ordinary rule applies. You'd be reluctant, which is true anyway, you're reluctant to dismiss the case on a complaint, although actually I did an antitrust case in another context a couple weeks ago and dismissed it on the complaint, but it's a lot simpler situation than this. But go ahead.

MR. DONSON: Let me articulate what Twombly says with regard to pleading a conspiracy.

THE COURT: Okay.

MR. DONSON: First of all, it says that you have to plead a factual predicate. That's the holding of the case --

THE COURT: Okay.

MR. DONSON: -- in the opinion. A Section 1 plaintiff must allege a conspiracy, together with the factual predicate for that assertion.

THE COURT: Okay.

MR. DONSON: It goes on to say that a mere bare-bones statement of a conspiracy, the legal conclusion isn't sufficient. And then it goes on to say that if the conspiracy is implausible, that's insufficient. So to have a factual predicate, it has to be more than bare-bones, and it has to be plausible. The plaintiff fails those tests in this case.

Your Honor, you can look at the complaint at length, and it alleges no acts by International Speedway Corporation. You read the complaint. NASCAR denied the NEXTEL Cup race. NASCAR adopted the rules and practices that supposedly prevent the creation of competing races. Not one word as to how ISC participated in that, only the bare-bones legal conclusion that there was a conspiracy by ISC to participate.

And Your Honor, so the plaintiff first of all fails to pass the bare-bones test of the case they brought to the Court's

attention. But secondly, the plaintiff's conspiracy claim is inherently implausible. And I'm going to spend just a minute on that.

Let's think about it for a minute. The plaintiff is saying that International Speedway conspired with NASCAR for there to be rules and practices that will prevent competing races. Well, the plaintiff says those are the rules and practices of NASCAR. They're not ISC's rules and practices. NASCAR is fully capable of adopting those rules and practices on their own. There is zero need -- they're NASCAR's rules. They're not International Speedway's rules. There is zero need for NASCAR to conspire to adopt those rules.

And the Sixth Circuit has addressed this very point on an antitrust conspiracy claim, very similar to this case. This involved Chrysler's marketing practices, policies, practices, just like they're saying with respect to NASCAR. This is what the Sixth Circuit said: "There can be no conspiracy where the actor imposing the alleged restraint" -- NASCAR -- "does not need the acquiescence of the other party" -- ISC -- "or any quid pro quo from him." NASCAR doesn't need any help from ISC to adopt these rules and practices.

Their claim's implausible for another reason: The plaintiff says that these rules and practices prevent competing races from occurring and that they would like to run competing races. And they say that --

THE COURT: That makes them a competitor, doesn't it, they want to run competing races?

MR. DONSON: Well, I think Mr. Singer has addressed that. They attempt --

THE COURT: He said they weren't a competitor.

MR. DONSON: I'm sorry?

THE COURT: He's saying they weren't a competitor. You're saying they are.

MR. DONSON: They're a competitor of International Speedway Corporation, and they want to -- what they're saying, with respect to these rules and practices, is they want to run --

THE COURT: They want to run their own races. Is that one of the allegations of your complaint, plaintiff's counsel?

MR. CHESLEY: Yes, Your Honor.

THE COURT: That you want to run your own race if you can't --

MR. CHESLEY: Yes, points and the whole nine yards.

THE COURT: That's what I thought.

MR. DONSON: And that's exactly what they say. So let me apply that to the point I was making.

THE COURT: So they want to be a competitor of NASCAR, if they have to. They'd rather get the NEXTEL, but if they don't, can't get it, they'd like to be a competitor and run their own race. That's what I read it. And they say you've got the industry monopolized so they can't do it.

MR. DONSON: Well, Your Honor, let me return to the conspiracy point.

THE COURT: And if they pled that much in 500 cases, then they'd have me striking their pleading for pleading evidence.

MR. DONSON: Well, Your Honor, they may have put a lot of words in their complaint, but I ask Your Honor to look at that complaint to see what they said about acts of International Speedway Corporation, my client.

THE COURT: They said that NASCAR and International Speedway Corporation have interlocking ownership and probably interlocking directors, although they didn't say that specifically, and that NASCAR has a market monopolized and is awarding these races based on these other racetracks that they own a part of getting the majority of the profits. And all it takes for a conspiracy would be for the coconspirator to agree to that and somebody to go do an overt act.

MR. DONSON: Your Honor, they've pled no acts of International Speedway Corporation --

THE COURT: I do a lot of conspiracy in criminal cases, and if A says to B, "We ought to go down and rob this bank," and you could go down there, B, at 9:00 in the morning -- "and the guard goes out for a cup of coffee at 9:00 every morning." And B goes down and robs the bank. They're both guilty. Doesn't matter that B could have done it himself, if they actually got

into it and one guy went and did it. Matter of fact, he doesn't even have to go down and rob the bank. He just has to go down there with the intention to rob it, and if B -- if the guard doesn't go for the coffee, he's still guilty.

MR. DONSON: Well, Your Honor --

THE COURT: And both of them are still guilty.

MR. DONSON: But I respectfully ask you to look through the complaint --

THE COURT: So you're setting up a strong man and knocking it down, as I understand the allegations of the complaint.

MR. DONSON: Well, let me finish my one point on implausibility.

THE COURT: Okay.

MR. DONSON: They cited the Twombly case. They're saying as a track operator, they would benefit by having competing races, races competing with the NEXTEL Cup.

International Speedway Corporation is a track operator, too. It could run NEXTEL Cup races. It could run competing races. So the claim is that International Speedway joined a conspiracy to defeat its own economic interest, its interest of increasing its revenue by running more races. Again, this is the exact sort of failure, the exact sort of implausibility, that has led to the dismissal of conspiracy claims in antitrust cases.

THE COURT: Okay. I admit that many of them are

dismissed on the complaint, probably because the Courts realize there's not a big probability of success and there's a lot of money to be involved in litigating these cases. So you do see more being dismissed -- matter of fact, just a couple weeks ago, I dismissed one myself on the complaint for that one --

MR. DONSON: Your Honor, I'm going to make one other point --

THE COURT: -- but others are not dismissed on the complaint, like this one here, the Spirit case. And how plausible or implausible it is, don't we have to know more about the market and the business and how it works?

MR. DONSON: No, not to determine that they fail to allege a conspiracy. Doesn't matter what the --

THE COURT: They did allege it. I read it at noon again. They did allege it. Anyway, I appreciate your input. You make some good arguments.

MR. DONSON: Can I have 15 more seconds?

THE COURT: Okay.

MR. DONSON: They have one final claim against International Speedway. It's an attempt-to-monopolize claim. It's paragraph 48 of Count 2. The parties agree that for that claim to go forward against International Speedway, International Speedway has to have engaged in exclusionary acts. Your Honor, there is no exclusionary acts.

The plaintiff alleges no barrier to NASCAR tomorrow

awarding a NEXTEL Cup race to plaintiff. They do not allege that ISC has an exclusive contract. They do not allege that ISC has a long-term contract. There is no barrier that ISC has imposed to preventing plaintiff from getting a NEXTEL Cup race tomorrow. And so I'm going to be quiet with that, but they've not alleged the element of exclusionary conduct.

THE COURT: Okay. You-all have been very patient.

MR. CHESLEY: Your Honor, we're breaking it up also.

THE COURT: Yeah, I'm going to take the long arm second.

MR. CHESLEY: Mr. Susman is going to handle the standing, the antitrust issue, and I'm going to handle the long arm issue.

MR. SUSMAN: Your Honor, let me begin with NASCAR's argument.

THE COURT: Why don't we say what the complaint alleges, as there seems to be -- I spent half an hour reading it at noon, after spending several hours reading it on other occasions, and there seems to be some dispute about what the complaint alleges, at least in its inferences.

MR. SUSMAN: Okay. In the very first paragraph of the amended complaint, we allege that defendant's antitrust violations have hurt race fans by causing higher ticket prices and creating fewer options; i.e., in antitrust jargon, by reducing output.

Their actions have hurt drivers by reducing awards they compete for, restricting the races they can compete in, and discouraging the construction of new tracks. It has hurt sponsors by giving them fewer options, hurt broadcasters by limiting the number of races featuring the highest caliber drivers, and hurt all independent racetracks. These allegations which have harmed the competition, not to a single competitor, are repeated in paragraphs 29 to 32 of the complaint.

Kentucky Speedway alleges that if it were allowed to competitively bid for a NEXTEL race, such competition would, in and of itself, regardless of who won, increase purse sizes, ensure track safety, benefit sponsors and broadcasters, lower ticket prices. Furthermore, we allege, if we won, we would be in a position to develop a different premiere stock car event that would compete with NASCAR's NEXTEL events.

There is not the slightest hint, Your Honor, in our complaint that we wish to join the cartel, to exclude other non-ISC tracks from competing for a NEXTEL race, or to measure our damages by the profits being made by tracks currently hosting NEXTEL races. Indeed, we seek an injunction that mandates competitive bidding for NEXTEL races.

Mr. Singer is right when he says that the way for the Court to analyze antitrust standing is to assume a violation of the law. That's what Areeda and Hovenkamp do. They suggest that, and that suggestion is attached to their brief. You assume

that there's a substantive violation, that the Government, for example, which does not need to show antitrust injury, could attack, and then the question is, well, can we attack it?

That means, for purposes of today's exercise, Court should assume that it would violate Section 2 for NASCAR to refuse to sanction a race at Kentucky Speedway. It would violate Section 2 for NASCAR, as a monopolist, to adopt a rule that prevents drivers from competing in NEXTEL races; and, finally, that it would violate Section 1 for ISC to have agreed with NASCAR on such refusal to sanction and on the adoption of such rules.

What is the motive for them to get involved in the adoption of rules? The rules are adopted to protect the NEXTEL franchise, one that we want to break up, not get a part of. It's a franchise that belongs almost exclusively to ISC tracks. They want these exclusionary rules that restrict drivers because if their drivers are not restricted, they will come to tracks like ours and other non-ISC tracks and begin doing what amounts to a competitive race to the NEXTEL races.

THE COURT: Okay. I think what's confusing the issue is you do allege in there that you want them to give you a NEXTEL race. And that is, of course, opening up the argument on the lead cases -- I even found one where somebody wanted to join a league, but because of the nature of the league, I guess you have to have a limited number of teams. But that's confusing things.

You're alleging, on the one hand, that you want the race; and on the other hand, you want to compete with the race. You're alleging one in one place and another in another place.

MR. SUSMAN: Yes.

THE COURT: So if you could clarify that.

MR. SUSMAN: Well, the answer is, I mean, I don't think -- I don't think there's any way the Court could award us a race. And I'm sorry we pled for that. But all we are really asking for is the competitive opportunity to compete and the destruction -- we do want these rules destroyed so that whether we get a race or not, we can provide something similar to premium stock car NEXTEL races.

Now, we do not suggest that the issue of standing can never be decided on the pleadings. We agree that it's possible for a plaintiff to plead itself out of court alleging its sole complaint was that it was hurt or that it wants to join a cartel, or to measure its damages by claiming it would have charged monopolist prices. In such cases, dismissal on the pleadings would be appropriate. But nothing of the kind is alleged in this amended complaint. And the Court, for present purposes, needs to assume it's true each and every allegation in our amended complaint.

In the first paragraph -- as I say, I've gone through those allegations in the paragraph, and NASCAR's either ignoring what's in there or trying to read into the complaint things that

are not in there. Way off their mark is their comparison of the allegations in this case to the dismissed allegations in the Sixth Circuit's Care Heating case. The complaint dismissed in Care, which we have furnished to the Court as supplemental authority in the last few days, the actual complaint, so the Court can compare that complaint with the complaint here, has one paragraph alleging harm, and it's paragraph 51, which clearly alleges only harm to the disfavored dealer --

THE COURT: Let me stop you. I'm trying to put this in simple language. Does your complaint, as I read it, contain an allegation, at least by implication, that under some circumstances, at least, you would like to run a race that competes with the NEXTEL race?

MR. SUSMAN: Absolutely.

THE COURT: And that would make it horizontal rather than vertical?

MR. SUSMAN: You asked for that, and the answer is, our current relationship, as Mr. Singer said, the actual current relationship, is a vertical relationship. But we are also, at the same time, potential horizontal competitors because if we can get a NEXTEL race by fair, competitive bidding and competition, or if we can create our own similar race, look-alike race, then we may ultimately lead to the creation of a new and competitive sanctioning organization where there's a new series of races at many tracks that are competitive to the NEXTEL Cup. And we

explain in the complaint why this is so.

The Care complaint was obviously prepared by a lawyer who didn't know anything about the antitrust laws. It's filed in State Court. It got removed. There's no allegation in that complaint of increased price to consumers, limited choices, or limited output. There's no allegation of plaintiff seeking to enjoin Train from having any exclusive or authorized distributors, or that Train was imposing restraints that prevented the plaintiff from going into the manufacturer of HVAC equipment.

Now, shifting -- their cases they rely on, the sports franchise cases, the accreditation cases, the medical privilege cases, each involve situations where the plaintiff seeks to join an exclusive arrangement, while leaving the exclusivity otherwise intact.

Your Honor, attached to their reply brief, NASCAR's reply brief, is section 348e1 of Areeda and Hovenkamp's treatise entitled, "Would Be or Actual Member of Combination or Substitute Monopolist - Plaintiff Seeks Access to Monopoly." The professors in that section discuss most of the cases on which NASCAR relies, including the Eleventh Circuit Todorov decision where a hospital contracted exclusively with a radiologist group to which the plaintiff, in effect, sought admission and damages, based upon what they were charging. The treatise, on page 400 of what they furnish you, explains, however, quote, "But if membership in the

group or invalidation of the exclusive arrangement with the hospital left plaintiff free to compete on prices, the incremental profits he otherwise would have earned would constitute antitrust injury," close quote.

The treatise then discusses a subsequent Eleventh Circuit decision, Ertag v. Naples Community Hospital, not cited in their brief, but it's in the Areeda treatise attached to their brief. That case, the subsequent Eleventh Circuit case, distinguishes Todorov and grants standing to neurologists that sought only the lost profits they would have made had there been no exclusive license. NASCAR doesn't tell the Court about Ertag, and no wonder.

The professors conclude on 401 that, quote, "The ultimate issue is whether the plaintiff (1) seeks to join the exclusive arrangement while leaving the exclusivity requirement otherwise intact; or (2) seeks to forbid exclusivity -- first on its own behalf, and implicitly in behalf of others. In the former case, the plaintiff is not a victim of antitrust injury, for there is no antitrust right to join a cartel. In the latter case, antitrust injury exists because the plaintiff is seeking to destroy an anticompetitive arrangement."

By explicitly asking that NASCAR create additional NEXTEL races and put up those for competitive bidding, it is clear that Kentucky Speedway falls in the latter category, seeking to destroy exclusivity.

By asking the Court to enjoin enforcement of rules restricting drivers, rules that would benefit us if we had a NEXTEL race, Kentucky is clearly seeking to destroy the cartel and create competition among premium race sanctioning bodies.

There is not a single suggestion in the amended complaint that Kentucky Speedway intends to measure its damages by looking at the profits that any track currently makes with a NEXTEL race.

NASCAR's opening brief furnishes the Court with Section 349 of the Areeda and Hovenkamp treatise. It's entitled, "Nascent Firms." I'll get back to that in a second. What comes between Section 348e1 and Section 349 -- they give you both of them -- is Section 348e2, which they don't give you. What's it called? Quote, "Plaintiff" -- and I have it here for you now, because it is -- and it's obvious why they don't give it to you. It's this case. It's titled, "Plaintiff Member Challenges Cartel Bylaws." That section, as you can see, discusses three sports cases.

THE COURT: Okay. You might have handed me the wrong thing.

MR. SUSMAN: On page 402, Your Honor.

THE COURT: Okay. Wait a minute. Okay. I got it.

MR. SUSMAN: You see page 402 now? There's a discussion there of three sports cases that illustrate the point that "A member of a combination may challenge a rule of a

combination (1) that limits competition unreasonably," even if the member could escape the rule by leaving the combination.

One of the cases discussed contains allegations very similar to those made by Kentucky Speedway. It is the Whitehorse case. And that is the Volvo case cited in the briefs from the Second Circuit, one they totally ignored in their briefing.

The defendant in the Volvo case was Men's International Professional Tennis Council, an organization just like NASCAR that's a sanctioning organization. It sanctions and schedules Grand Prix tournaments for men's professional tennis. The plaintiffs in the case were owners and producers, actual and potential, of sanctioned and not sanctioned events who complained that MIPTC adopted rules very similar to the ones adopted by NASCAR to discourage players from participating in nonsanctioned tournaments.

MIPTC made the following arguments which the trial court accepted in dismissing the complaint. It's his argument. "If plaintiff's theory is correct, and MIPTC is a vehicle through which tournament owners and producers have organized a cartel in the market for mens professional tennis, then plaintiffs lack standing to challenge the cartel because, as owners and producers of sanctioned tournaments, they, themselves, are members of the cartel who stand to benefit from the cartel's unlawful activity."

Second Circuit reversed, refusing, quote, "to adopt a rule precluding cartel members from raising antitrust challenges

against the cartel." Here's what the Court said: "To the consent a cartel member incredibly asserts" -- us asserted -- "that it would be better off if it were free to compete, we say that, such that a member's interest coincides with the public interest" -- ours does, with the fans, with the sponsors, with the drivers, with the broadcasters -- "we believe that an individual cartel member satisfies the antitrust injury requirement," quote, "because the individual cartel member's interest may diverge from the interest of a cartel as a whole.

MIPTC's decision relates to site location and scheduling might not work to plaintiff's advantage even though they are owners and producers of sanctioned events. The plaintiff's claim that MIPTC uses power to shield tournaments favored by MIPTC from the rigors of competition" -- that's exactly what we quote. "And in our view," says the Second Circuit -- I'm still quoting -- "this allegation satisfies the antitrust injury requirement; thus, because plaintiff's individual interest may coincide with the public interest in promoting competition, we believe that plaintiffs have satisfied the first element of the standing analysis."

So that case, the Volvo case, is on point. They ignore it in their briefs. They don't give the Court the section of Areeda and Hovenkamp that discussed that and two very similar sports cases.

They argue, Your Honor, that we lack standing in the

complaint about the adoption of rules that prevent the best drivers from racing at Kentucky Speedway. And that boils down to a few District Court cases that say a sports team can enter into exclusive arrangements with its own employees and a grab bag of other cases that say that the prevention of free writing is a business justification that Courts will listen to in assessing the reasonableness of a restraint. None of the cases they cite say it's, per se, lawful for a monopolist to impose restrictions on independent third parties like the stock car drivers that race in these races who are not their employees.

Exclusive dealing agreements, particularly by monopolists, are always subject to a rule of reasonable analysis, even though they have the alleged goal of preventing free writing. They all have that goal. NASCAR cannot cite a single case it has that a monopolist's exclusive distributorships are, per se, lawful because they are designed to prevent free writing. The only standing point that NASCAR makes about the driver restrictions is that Kentucky Speedway has not properly pled that it is a potential rival because it's not pled that it is prepared to organize a NEXTEL-like event on its own.

Again, going back to the Bible, the amended complaint, paragraphs 20 to 25 alleges that our track was built and designed to host premium stock car racing events. Paragraph 30 alleges that, absence defendant's actions, quote, "Kentucky Speedway would have competed by offering, in part, larger purses, larger

capacity ticket sales, better amenities, and safer tracks."

Paragraph 39 alleges, quote, "Kentucky Speedway would have been able to attract top stock car drivers and their teams to compete in NASCAR premiere format-type stock car races and other events at Kentucky Speedway," close quote.

But they say you've not alleged having taken affirmative action toward the entry in the premiere stock car race market or having consummated contracts in the additional construction or sponsorship.

Well, Your Honor, you were right when they said this is pleading. We don't have to plead facts. This is notice pleading under Rule 8. We know to plead the four factors that the Sixth Circuit in Huron Valley Hospital said could be considered in determining whether someone is prepared to and intends to enter a market, but the Twombly case makes it clear that in a conspiracy, you don't have to plead any of the plus factors that converts parallel conduct among horizontal competitors into a conspiracy.

In the second place, no case has ever held that a plaintiff must prove each of the four factors listed in Huron Valley Hospital in order to have antitrust standing. Areeda and Hovenkamp, in their discussion of nascent firms, which is attached to their first brief, at Areeda, the relevant section on nascent firms is attached, they cited many cases which, according to plaintiffs, have neither entered into contracts or taken any affirmative steps if, as Kentucky Speedway, they are first

experienced, which we are (2) well financed, which we are, and (3) successfully having operated a business in a very closely related market for six years. That's enough.

Here's what the Sixth Circuit said in Huron Valley -- they don't quote you this -- quote, "Although a person must have a business or property interest to bring an antitrust action, it is not required that he be engaged in an ongoing business. Antitrust injury can be suffered by nascent business enterprise as well. The antitrust laws protect the serious potential competitor, as well as the established business. The test for determining whether a potential competitor has a business interest protected by antitrust laws is whether he has both the intention" -- and the only thing -- you ask about the pleading, whether we say the pleading is any different in an antitrust case than the standard on a motion to dismiss. And we state, the standard is the same, but that because antitrust cases often involve issues of intent -- in this case, what was our intent -- the Courts have said, maybe they aren't as susceptible as other types of cases to resolution on motions to dismiss, because items about intent you get through discovery. Their intent, their specific intent, we get through questioning them. Our intent, they get through taking our depositions and looking at our documents.

THE COURT: I think you've probably had about equal time.

MR. SUSMAN: Your Honor, can I hit his points? I'm sorry.

THE COURT: Quickly.

MR. SUSMAN: On the flows-from argument, he talks about these six Sixth Circuit cases.

THE COURT: Yes.

MR. SUSMAN: The case that organizes them all and describes them all is Cardizem. That's the case. Because it distinguishes -- it distinguishes all the cases he relies upon.

THE COURT: What's the name of that one?

MR. SUSMAN: C-A-R-D-I-Z-E-M. It talks about Axis, Hodges, Valley Products, and Watkins. And the citation is in our brief, but I can give it to you right now. Oh, it's right here.

MR. NELSON: 332 F.3d 896.

MR. SUSMAN: That case, Your Honor -- let me just go to the very end. The Sixth Circuit said, quote, "In none of these cases was a complaint dismissed for failure to allege antitrust injury based on the defendant's claim that it could have caused the same injury without committing an antitrust violation."

And then it sums it up in footnote 19, key footnote they ignored. Here's what it says. Quote, "In addition, the defendant's position, if taken -- "the defendant's position, if adopted, risks undermining a basic premise of antitrust law; that, as the District Court observed, in many instances, an otherwise legal action -- e.g., setting a price -- becomes

illegal if it is pursuant to an agreement with a competitor."

Under the defendant's view -- Mr. Donson's view -- such action would never cause antitrust injury because a defendant could have unilaterally and legally set the same price. Absolutely. They could have terminated us unilaterally. If they would have done so, we would have had a claim against them for refusal to deal by a monopolist, but only then under Section 2, unilaterally by a monopolist. But they didn't do it unilaterally. We allege they do it in cahoots with ISC. That is a violation of Section 1. Our injury flowed, as he says, from that refusal to give us a franchise. He doesn't like that we allege that he was in cahoots with that decision of refusal to give us a franchise, or sanction a race at our place, but it's in the complaint.

We have more than adequately -- we have pled our conspiracy allegations, Your Honor, are clearly pled in --

THE COURT: I thought they were clearly pled.

MR. SUSMAN: I mean, they're there. We talk about who was in it, we talk about it was a conspiracy to allocate market, a conspiracy to fix sanctioning fees and purses, a conspiracy to deny sanctions to nonaffiliated ISC tracks.

We have talked about motive. The motive is the common ownership, the common directors and officers. We do plead common officers and directors. And we have pled that they were both doing something against their interest. NASCAR was refusing to

sanction a race to the highest bidder. That would be profit maximizing for them. And these guys, ISC, were going in and buying these dog tracks that were losers, that had no NEXTEL race, and, lo and behold, shortly thereafter, they got the NEXTEL race. It was not in their economic interest to buy a dog track unless they had a commitment from their coconspirator that they would get a NEXTEL race upon acquiring that track.

So, Your Honor, that, I think, is my -- I mean, I have more to say, but --

MR. SINGER: Your Honor, I would be very brief in rebuttal.

THE COURT: One minute.

MR. SINGER: They made a very important admission when Mr. Susman says that you should strike from the complaint, shouldn't have been in there, a request to award a race. That should occur. And along with that -- but that is a NEXTEL Cup race. And along with that, the first part of their case should be dismissed for lack of standing, because that is squarely in the line of cases, both in the Sixth Circuit and the sports franchise cases, that say they are trying to be part of this activity that they say is anticompetitive.

They talk about paragraph 1, the ticket revenues are too high. They want to share in the ticket revenues for the NEXTEL Cup race. The same with TV revenue. They can't have it both ways. It's the second part of their claim, the part where

they say, We want to have a right to independently compete and challenge the rules that prevent us from competing. Therefore, we submit if the allegation is sufficient in paragraph 30, then you should have limited discovery on whether they really are in a position to have an independent race and are affected by these rules that they identify, not open it up more broadly.

I note, Your Honor, we cited -- and I don't know what Mr. Susman's looking at, but the parts of Areeda and Hovenkamp that he cites are found -- not only cited, but are attached to our reply brief. And with respect to the Care Heating case, if you look at paragraphs 50, 51, and 52, you see allegations in that case about effects on competition, notwithstanding it's dismissed for lack of antitrust injury.

THE COURT: Okay. You made it in the minute.

MR. DONSON: Do I get 60 seconds, Your Honor?

THE COURT: Yeah, that's what you got.

MR. DONSON: Your Honor, I would commend to your careful attention the Sixth Circuit cases that establish this necessary predicate principle. Frankly, Your Honor, I believe they command dismissal of the claim with respect to the NEXTEL Cup. I frankly believe this case would be reversed on appeal if it's not dismissed because of that, because those cases are crystal clear. It is NASCAR's decision to deny the NEXTEL Cup that's the necessary predicate and the immediate cause, not the conspiracy. And all six of those cases line up precisely with

that analysis.

And the last comment I'll make -- you can tell me when I'm at 60 -- is Mr. Susman talked about anticompetitive effects, and I said that these cases do not require -- or that they assume anticompetitive effects. If you look at the Hodges case, if you look at the Valley case, if you look at the Axis case, they all assumed a violation.

THE COURT: Time's up.

MR. DONSON: Thank you.

THE COURT: I think you said this same thing before.

Okay. Let's move on to the long arm. And in this case, it might be more productive to reverse the procedure, although it's the defendant's motion, and have the plaintiff tell us what their theory -- what they think their best theory is of personal jurisdiction, as there are several possible theories, and why don't you proceed.

MR. CHESLEY: Your Honor, could I ask the Court's permission to get a washroom break?

THE COURT: Okay. We can take about five minutes.

MR. CHESLEY: Thanks.

(Brief recess.)

THE COURT: Okay. Well, let's proceed. Rather than guess what your theory is -- there's about four possible theories -- what do you think is your best all-around?

MR. CHESLEY: Judge, instead of going to Calder v.

Jones, which is the effects in Kentucky, let me take a simple approach to see if -- this may make sense. I'm fascinated -- incidentally, Calder v. Jones we didn't see in their first papers, and was the same in Ferko, and then they had it in their response.

I'm fascinated by the position taken in their declaration, and in their pleadings, in which it says that ISC does not own or operate a website, and even if it did, there's nothing about the website's object to jurisdiction in Kentucky. And they also say -- first, ISC does not own or operate the website at issue. Your Honor, I would like to give to the Court the face sheet of their web sheet --

THE COURT: What I'd really like to do at this point, rather than start getting into the facts, which I know you're prepared, but what are you proceeding under? You got a possible theory just under the Kentucky long arm, basically.

MR. CHESLEY: Correct.

THE COURT: You also got a theory about a conspiracy.

MR. CHESLEY: All right.

THE COURT: And you got another theory under the antitrust statute.

MR. CHESLEY: Correct.

THE COURT: Section 22, in only some of those do we have to get into all these facts about the website and all that.

MR. CHESLEY: Let me make it simple.

THE COURT: One argument you make is there's proper venue when a substantial part of the events or omissions giving rise to the cause of action occurred in the district. And so that's the general venue statute. And what's your argument about that? I think you had an argument in there, but I want to be sure I understand it, without getting into the website and all that.

MR. CHESLEY: All right. The venue, Your Honor, first of all, under conspiracy --

THE COURT: One problem with the website, it might be run by a subsidiary, and then you got to get into whether the subsidiary --

MR. CHESLEY: Your Honor, I would only ask the Court to look at one paragraph. That's the only thing I am asking the Court to do. And then to defray -- okay. Site content is the only thing I'd ask the Court to look at, because it goes to the issue in their declaration, and that's why I feel that I must.

THE COURT: What statute are you proceeding under? There are two possible statutes to get personal jurisdiction. What statute are you proceeding under?

MR. CHESLEY: 15 22, Your Honor. We can state to the Court categorically, as witnessed this morning, Mr. Mark Cassis, executive vice president and general manager, went to ISC's website and purchased a ticket at the Daytona Speedway. And it is shown that it comes from ISC Motor Sports, and then the ticket

is transferred by Daytona, one of ISC's tracks, NASCAR race, NEXTEL.

Candidly, Your Honor, if I take two recent cases out of Kentucky. First of all, I'd like to look at Judge Forester's case in Lexmark. So long -- even if there's an intermediary -- in other words, the Courts have determined that the maintenance of a moderately interactive website is sufficient for the exercise of personal jurisdiction.

We have one that has marketing. You can even buy a job, get a job. It's not just an information. And to suggest in their declaration they say they don't buy anything, you can buy anything and everything on their website. So you have an interactive. It follows Judge Forester's. It follows the recent case of the Sixth Circuit case of Scotts v. Aventis, which is in our brief, in which it makes it very clear at page 5 of that opinion that --

MR. NELSON: It's the Neogen case.

MR. CHESLEY: Thus, under the effects test of Calder, the focal point of the effects, the defendant was potentially aware of the terms to Scotts based on the terms of the master contract. Your Honor, I would like to pass up to the Court an unpublished opinion which is right on point by Judge Hood of this district, which is the Laserland, which is a little different than Lexmark, in which he held the exact same set of facts, and he did a full analysis based on the exact same discussion of

personal jurisdiction and went through every single one of the things that I could go through and spend 15 or 20 minutes for, which I don't need to.

So if I take the interactive website, plus 15 22 that says you have a right to file anywhere nationally, and then I also take a look at the long arm statute of Kentucky, which is the best on due process, that you can literally tag anyone at any place, plus you get the advantage of 15 22, if you wrap those all together, plus Aventis, the two cases out of the Eastern District, we have an interactive website, at least at this juncture of the case.

They sold something as recently as today in Kentucky. And the conclusion they make, which is what you have to prove, is that it's only for Kentucky. That's ridiculous. And they also have a radio station, Your Honor, in which they have nine different radio stations in Kentucky that they operate with.

I think I wanted to make it simple and quick, but I could --

THE COURT: I think what they're going to say is they got a subsidiary running the radio station.

MR. CHESLEY: They may have a subsidiary running the radio station, but they're all over it.

THE COURT: That would require a lot of factual. I was looking for a simpler approach.

MR. NELSON: There's also a way, on Calder v. Jones,

the effects test is, if you read Scotts v. Aventis, which is a Sixth Circuit case recently, it says under the effects -- this is page 5, under the effects test of Calder, the focal point of the damage was Ohio, and the defendants were unquestionably aware of the potential damage to Scotts. The same thing is true here. The focal point of the damage is Kentucky, and the defendant was unquestionably aware of what was going to happen.

THE COURT: Let me just ask you, 1391(b), venue. It says proper venue is a "District in which a substantial part of the events or omissions giving rise to the cause of action occurred." And then it says the venue closer -- this is a more theoretical approach.

MR. CHESLEY: I understand.

THE COURT: Venue is getting closer to personal jurisdiction because 1391(c) says any corporation "shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction." So they get tied together.

Then we go over to the antitrust statute, which seems to say anyplace you got venue, if you got proper venue, you have nationwide service of process. So if the venue is proper, the nationwide service of process is proper.

MR. CHESLEY: You certainly said it better than I.

THE COURT: That was in your brief. Do you want to elaborate on that at all, or have I understood it correctly?

MR. CHESLEY: You've understood it, but I want to add

one other thing.

THE COURT: Okay.

MR. CHESLEY: In their papers, they claim that we didn't cite 1391(c). We cited 1391(c) as a subpart.

Additionally, I would add, Your Honor, going back to the Court's comments at our last hearing, when Mr. Snyder brought this issue up, I believe the Court's point was that under the long arm statute of Kentucky, if you have a conspiracy -- and we clearly, undisputedly have jurisdiction over NASCAR, and for purposes of our complaint, all things must be taken in 12(b)(2) and (3) as alleged, we have set forth the conspiracy. And, Your Honor, I think that's enough at this juncture, and I don't think -- I'm happy to respond to, since I went first, anything they have to say, but there's six theories and we don't need all six. Any one of them's good enough.

THE COURT: That's why I wanted to see what you thought was the best. Okay. The first one's pretty simple. If you have proper venue, if a corporation's deemed to reside or is subject to personal jurisdiction, then you come to personal jurisdiction. Person is subject to personal jurisdiction in Kentucky if they cause tortuous injury by an act or omission in this common law. And the allegation in the complaint is -- now they're talking about taking it out -- that they wanted to have a race in this Commonwealth and they omitted to give it to them. Sort of like you're supposed to come in and inspect my elevator in this

Commonwealth, you don't come, and that gives rise to the cause of action.

MR. CHESLEY: And also, I don't think we have to withdraw, Your Honor. That's a but-for type argument.

THE COURT: But in any event, that's one -- that's maybe the simplest theory, that defendants are deemed to reside wherever there would be personal jurisdiction; and the allegation is that they caused personal injury by an act or omission in this Commonwealth, the omission being or the act being to discriminate or cause antitrust injury to the plaintiff by the result of this conspiracy.

Okay. Then there's a separate conspiracy theory where the best explanation I have found for it is in a case called Jung, 300 F.Supp.2d 119. I don't know if you-all are familiar with that or not. District of Columbia, I think. Yeah, District of Columbia. And I'll just read what he says. "Plaintiffs assert that the Court has jurisdiction over all the moving defendants pursuant to the conspiracy theory of long arm jurisdiction. Under this doctrine, acts undertaken within the forum by one coconspirator, in furtherance of an alleged conspiracy, may subject a nonresident coconspirator to personal jurisdiction under the long arm statute." It cites several cases.

Plaintiffs claim that personal jurisdiction exists over each moving defendant pursuant to the conspiracy theory of

jurisdiction stemming from Section 13 423(a)(1). Conspiracy jurisdiction under this subsection presumes that the persons who enter the forum and engage in conspiratorial acts are deemed to transact business there directly, and coconspirators who never entered the forum are deemed to transact business there by an agent. So long as any one coconspirator commits at least one overt act in furtherance of the conspiracy in the forum jurisdiction, there is personal jurisdiction over all members of the conspiracy."

Okay. So that essentially -- it does say the conspiracy has to be pleaded with particularity, as you've been trying to point out. Okay. So that's the second theory.

The third theory, I guess, would be that since venue is proper, Section 22 gives us nationwide service of process. So let me hear whoever wants to argue it. Why my analysis of it is wrong, or you can comment on the website, too.

MR. ACKER: First of all, let me say a couple of things about that. ISC does not have a radio station, and we don't have subs that run radio stations. There is a sub that's shown in the affidavit that syndicates a broadcast that is transmitted on radio stations across the country that are not owned or operated by us. So that's one thing.

THE COURT: What are the broadcasts about, the drivers and the races?

MR. ACKER: Races and stuff like that, yes, Your Honor.

The second thing, on the website, I think the analysis on the website, there is a twofold analysis. First of all, you have to look at it under general jurisdiction. Is the website itself sufficient to -- sufficient to do business in the state, to be interactive in doing business in the state? I think the cases are clear. And there's a number of cases that we've cited in our brief where, for general jurisdiction, having the website, even if it permits the -- even if the public is permitted to buy tickets or to go on line, that is not sufficient. I don't think there's any cases that hold that operating a website is sufficient for general jurisdiction.

That leaves it for specific jurisdiction. Is the operation of a website -- and we would say ours is just like almost every other website. We don't search out people in Kentucky. They sign on the web and come to us. It's similar to, I believe, what this Court has held in the Mayo Clinic case; that that was -- the operation of the website itself would be by people in Kentucky going to us; and, yes, they could buy tickets. And that's operated by -- they have two problems with the website. First problem that they have is the website is operated by a subsidiary, and as a general rule, it's ISC.com. And as a general rule, the actions of the subsidiary don't bind -- there's no piercing-the-corporate-veil argument here.

THE COURT: That's what we held in the Mayo Clinic, although that was an independent foundation. That was the

clinic.

MR. ACKER: Right. There's no basis for holding us liable on behalf of what a sub does. And secondly, even if it were our acts, the acts of the sub would be insufficient. Operating a website like that would have been insufficient.

THE COURT: I didn't want to get into all that, but I figured that was your comment on them.

MR. ACKER: Right.

THE COURT: These others seem more simple. So what have you got to say about, say, the conspiracy theory?

MR. ACKER: Could I add one other point on the website, Your Honor?

THE COURT: Sure.

MR. ACKER: That is, secondly, if they're trying to get on the website for specific jurisdiction, then the cause of action has to arise out of the website.

THE COURT: I understand.

MR. ACKER: And their cause of action for not getting a race doesn't arise out of the website.

THE COURT: Unless it's part of the conspiracy. Okay. At least that would be complicated. We'd have to have discovery on it and we'd have to waste a lot of time. But what have you got to say about (1) the conspiracy theory and (2) the Section 22 theory?

MR. ACKER: Yes, Your Honor. It's interesting, on the

conspiracy theory, in their papers, they raised it in a footnote.

THE COURT: I don't care if they send it in a paper airplane if it's valid. Maybe I know more about conspiracies than they do. I may not know more about antitrust law than you guys, but I may know more about conspiracies because I've been doing them for 27 years. But anyway, whether it's in the footnote or wherever it might be, what have you got to say about it?

MR. ACKER: Your Honor, in Chrysler v. Fedders, (6th Cir. 1981), the Sixth Circuit said that it had never addressed the conspiracy theory prior to that time. And it commented in that case that using the conspiracy theory in this context was an impermissible means of trying to -- or had been considered to be an impermissible means of trying to enlarge the transacting business test of Section 12 of the Clayton Act.

THE COURT: Okay. What case was that?

MR. ACKER: That was Chrysler v. Fedders, 643 F.2d 1229.

THE COURT: You say that was 1981?

MR. ACKER: Yes, sir.

THE COURT: That's a long time ago.

MR. ACKER: Well, since that time, Your Honor, we have been unable to find any case in the Sixth Circuit where the Sixth Circuit has exercised jurisdiction, personal jurisdiction, based upon the conspiracy theory. There are some circuits that have

discredited that, that had previously accepted the conspiracy theory and no longer do, like the Ninth Circuit.

But if you look at all of the cases since then, what happened in Chrysler v. Fedders, what happened in the Ecclesiastical Order of the Ism, which is another Sixth Circuit case, what's happened in all of those cases, is that they've looked at the allegations, similar to these allegations, and the Courts have said it is unfair, it violates -- it would be violative of the defendant's due process rights to hold them to personal jurisdiction based upon these allegations of conspiracy. And we think that that's what ought to happen here, is that if you look at these allegations, they can't just say, well, you know, they conspired to not give us a race, they conspired to do this. No court that we have been able to find and no court that -- and no case that they have cited has held jurisdiction in the Sixth Circuit based upon --

THE COURT: Only in the Sixth Circuit? I was going to say, this one I just read did.

MR. ACKER: In the Sixth Circuit based upon this conspiracy theory. They have general allegations of conspiracy, and that is not sufficient -- we don't believe that should be sufficient, and we think that otherwise, no defendant could -- their due process rights would not be protected adequately.

In terms of Section 22 --

THE COURT: We have some people that allege they're in

jail because the U.S. Attorney's in conspiracy with Osama bin Laden. That might be a little easier to decide than this one.

MR. ACKER: In connection with that also, Your Honor, that conspiracy theory, I think it is very important for the Court to look at the long arm statute for Kentucky.

THE COURT: I have looked at it.

MR. ACKER: And if you look at 454.210(2)(a)(4), it talks about -- and we couldn't find any Kentucky cases where personal jurisdiction existed as a result of this conspiracy theory. And I think the reason is, if you look at the Kentucky long arm statute, you look at the last phrase of that paragraph 4, it says, "Provided that the tortious injury occurring in this Commonwealth arises out of doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth."

So they would not only have -- they would still, as a part of the conspiracy, to get within the long arm statute even under the conspiracy theory, they would have to show that we did something in Kentucky.

THE COURT: Well, you circulate these broadcasts and you have the website where you're apparently selling jackets and things like that.

MR. ACKER: Your Honor, I think those --

THE COURT: I'd have to allow discovery on that and see what we can turn up.

MR. ACKER: Your Honor, I think those are insufficient for general jurisdiction.

THE COURT: Well --

MR. ACKER: I do not think that those would come within that provision. Those are acts, again, by a subsidiary.

THE COURT: Um-hmm. That's the problem.

MR. ACKER: And as far as Section 22 -- or Section 12 of the Clayton Act, circuits are split. The Circuit has not decided whether or not the -- and they didn't really argue it this way so maybe they're not taking the position that they can get nationwide service of process only by having contacts with the United States. If they're not arguing that, I won't belabor the point.

THE COURT: Well, you say in your brief that a venue is proper, that statute applies venue over somebody. So the venue is an act based -- or 1391 says where a substantial part of the act or omission occurred. And they allege acts or omission in this Commonwealth, which gives us venue, as I understand it, and then there would be nationwide service of process.

MR. ACKER: Your Honor, I think if you look at Section 12 --

THE COURT: Even though it's not enough for general specific jurisdiction.

MR. ACKER: Right. In Section 12, there is a venue provision, and it says if you meet that venue provision in the

first clause of Section 12, then you can get the nationwide service of process under the second clause of Section 12.

The first clause of Section 12 has three distinct parts to create venue for this second nationwide service-of-process provision to apply. It says that you have to be an inhabitant. ISC is not an inhabitant. It's not incorporated here. It doesn't have its principal place of business here.

It says you have to be found here. We are not found here. And that's continuous local activity. We don't have that. We don't have officers, directors. We don't have anyone here that's established, uncontroverted by the affidavit that we filed.

And third, that ISC doesn't transact business here. ISC is a holding company. It transacts no business here. The only thing that they go back to is the website by a subsidiary where tickets are sold to out-of-state races.

And these syndicated radio programs are broadcast by radio stations owned in the state, not by us.

THE COURT: But you do the broadcast?

MR. ACKER: But that is -- it's not directed specifically at Kentucky. Those are --

THE COURT: Well, it's in -- I presume the broadcast is to try to arouse fan interest so they come to your track.

MR. ACKER: That's also by a subsidiary, Your Honor. That is a subsidiary to ISC.

THE COURT: See, we'd have issues of fact on that. That's why I thought the others might be simpler.

Now, on the 22, the interesting thing is, that probably -- that was enacted, when, 1900 or something like that, that Section 22, some long time ago. Okay. And that probably tracked the federal venue statute at that time. But since then, in 1990, the federal venue statute was amended so that you have venue wherever any substantial part of the cause of action occurred or omission occurred. An independent omission can occur, I guess.

Do you believe that the venue should be read under the modern 1391, rather than those three phrases in the beginning? I know you don't, but that's a question. Do you know of any cases that have discussed that?

MR. CHESLEY: Your Honor, I could -- oh, I'm sorry.

MR. ACKER: Your Honor, I don't think it makes a difference. I don't think that there is -- I don't think that there is venue under either of those statutes.

THE COURT: Well, a substantial part -- they say they didn't get a race or that they're keeping them from having a race, which is a substantial part of the acts or omission.

MR. ACKER: Worldwide Volkswagen and a number of cases say that you have to establish jurisdiction and venue as to each defendant. And they're talking about they didn't get a race from NASCAR, who's the only one that can sanction a race. There is no

action by ISC in Kentucky that they can point to.

The Sixth Circuit -- and in terms of this other part of their Calder v. Jones test -- and we would refer the Court to the Reynolds case, which we think is much more on point than the Calder v. Jones case -- the Sixth Circuit has repeatedly held that the mere fact that an in-state plaintiff suffered monetary injury is insufficient when the defendant didn't purposefully do some act in the state.

So even if they claim this conspiracy, it's not directed just at Kentucky; it's people all over the country, you know, every other state didn't get a race either under their theory.

So it seems to me that it is -- the fact that they are here and the fact that they didn't get a race, if they're claiming an injury to competition, competition everywhere, that it is not purposeful action directed at Kentucky, and we think that's -- we think very strongly that it would violate our due process rights to hold us to personal jurisdiction.

MR. NELSON: Can I just pick that one up?

MR. CHESLEY: Just a second. May I respond, Your Honor?

THE COURT: Yeah.

MR. CHESLEY: Let's go to 22 and go back to the 1900 versus 1990. I want to cite two cases out of the Sixth Circuit, Medical Mutual of Ohio v. de Soto, 245 F.3d 561 (6th Cir. 2001).

The Sixth Circuit did hold that a --

THE COURT: Give to it me again.

MR. CHESLEY: I'm sorry, 245 F.3d 561, (6th Cir. 2001). The Sixth Circuit did hold that an ERISA federal statute that provided for nationwide service of process, immediately analogous to antitrust, conferred personal jurisdiction and that the question then became whether defendant has sufficient minimal -- minimal contacts with the United States, citing United Liberty Life Insurance Company v. Ryan, another Sixth Circuit case in 1993, 985 F.2d 1320, a nationwide service of process statute under this SEC, Security Exchange Act, in Haile, H-A-I-L-E, v. Henderson National Bank, 657 F.2d 816. And I know that one is suggesting that this is a subsidiary, and I'm suggesting, Your Honor, that what's already in front of the Court, if you take 22, you take Calder v. Jones, not cited in their original -- not even recognized until we brought it up -- the leading case on the issue of who-is-harmed effects in Kentucky, the allegations we made in our complaint, which must be assumed to be true, the purposeful availment to suggest that, gee, they didn't want any business.

They even sell Visa cards, ISC Visa cards. It's this very nice, innocent, gee, these folks in Kentucky are rushing to us and we are offering it on our website, a Visa card, discount points. In other words, if you buy tickets at different ISC tracks, you get points and you get cheaper tickets. Now, Your

Honor, that is solicitation. And I think Aventis is right on target, and I think Judge Hood's case and I think Judge Forester's case. And I did check with those counsel. Neither of those cases were appealed, Your Honor. And I find them to be very informative on the issue.

THE COURT: I have a problem with the website, is they say it's run by a subsidiary.

MR. CHESLEY: Your Honor, on the face, on the face, when it says ISC-controlled site, that's their bold statement. They made a declaration, which is an affidavit by Mr. Sanders, that said they don't do business in Kentucky and they don't advertise in Kentucky. Your Honor, to suggest that that could even be accurate -- and all I ask the Court to do is that's an adverse inference and we're entitled to that adverse inference when, on their website, they say they are controlled, licensed by ISC. The bold statement by counsel here today to defeat jurisdiction -- pardon me, claiming --

THE COURT: Well, I'd probably have to allow discovery on it.

MR. CHESLEY: Well, I don't want to do discovery on this because I don't think you need discovery, but you could take it under Aventis, you could take it under Judge Forester's case, you could take it under Judge Hood's case. You could take it under Calder v. Jones. And you could take the analogy of the SEC under ERISA and the three cases I just gave the Court. I think

there's six criterium.

And the other thing, Your Honor, is long arm. I'm going to go back to the Court's comment in the transcript in which you look at the long arm statute of Kentucky in which it has the broadest possibility. You couple that together with the allegation of conspiracy -- they may not like it because it's in a footnote -- and that's enough under the long arm statute of Kentucky to protect the citizens of Kentucky from harm.

THE COURT: What's your theory about what ISC did in furtherance of the conspiracy? Complaint's a little vague.

MR. CHESLEY: All I can tell you is with the exception of grandfathered tracks, three out of the last four races got ISC tracks, and they've committed two races to Seattle where they have not even built a track and one to New York City where they've not even built a track. They've already stated publicly that they're going to get NEXTEL races.

Miami, Florida, is the best example. That was a track, man almost went bankrupt. They bought it for peanuts, and three months later, they had a NEXTEL race.

Your Honor, the point is that the allegations of our complaint are severe enough and the conspiracy is severe enough and the interlocutory directors; and I think we're entitled not only to the allegations of our complaint, but the inferences that are actually drawn. And I don't believe that they can, in any way, substitute their bold-based statement that they don't sell

things when right on there they say, "Shop now. Officially licensed merchandise," plus a Visa card. And it's ISC Motor Sports, an entertainment company. And today, we bought something in Kentucky.

Your Honor, I mean, there's six -- you know, we don't need all six of them, but you can take any one of those. And I think 15 22 certainly conveys national and the antitrust statute, Clayton Act, which is identical. The fact that the Sixth Circuit hasn't commented on it doesn't make it not so. And to suggest that since it doesn't exclusively say it goes to Kentucky, there's not one case cited by these defendants to suggest that a website has to only look to the particular statement. And that's the Amazon case. And I think, Your Honor, there is enough there for jurisdiction, general jurisdiction and subject jurisdiction.

MR. ACKER: Your Honor --

MR. NELSON: Your Honor, two quick points, Your Honor. First, Mr. Acker talked about the Reynolds case under Calder, and he said that's distinguishable from this particular case and that's why you shouldn't rely on the Scotts case. If you look at Reynolds, you can see exactly why this case, there's jurisdiction under Calder v. Jones. In Reynolds, the action took place in Monaco. The defendant had no idea it was going to happen in Ohio.

There was a press release that issued in Monaco. It was about a track star who had a urine sample. The urine sample

was taken in Monaco. Here, our allegations, exactly like Scotts and Aventis, that together, ISC and NASCAR wanted to deny Kentucky Speedway a race, and because they wanted to deny it, they knew -- it wasn't just Mr. Acker said that it was all over the country. Well, no. Our allegation specifically states otherwise. They wanted to deny us a race here in Kentucky. That's the thrust of our injury is exactly that, which is exactly like Calder.

Second, on the subsidiary point, very briefly, we cited in our papers the Wedge case, the Dean case, that say that the parent-subsidiary relationship is something -- it's an important factor to look at in deciding.

THE COURT: That's what I said. We may have to allow discovery on that.

MR. NELSON: You're right,, and so that's why we're talking about Calder, too.

THE COURT: Okay. One minute.

MR. ACKER: Your Honor, well, several things. First of all, a lot of what's been said here is completely outside the record. They've not made -- that's something that's just been sprung on us today. We do have some issue with that.

Secondly, as far as the conspiracy they're talking about, you're talking about the effect. What they're claiming is the effect, not any act by ISC in the State of Kentucky. The cases --

THE COURT: At the risk of being tedious, I point out that all coconspirators are charged with the acts of the other coconspirators. That's the theory of a conspiracy.

MR. ACKER: In the Kentucky long arm statute, Your Honor, in looking at the Kentucky long arm statute, it talks about, in subparagraph 4, "Provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct" here.

THE COURT: You'd be charged with the acts of NASCAR under the conspiracy theory. They're considered to be your agent.

MR. ACKER: What they have done --

THE COURT: At the risk of being tedious, they're considered -- if the conspiracy theory applies, you would be charged with the acts of NASCAR in Kentucky, and they don't deny they're active in Kentucky. So you may be right, that it doesn't apply; but if it does apply, those criteria would be met by your agent. All coconspirators are agents of all the other conspirators. So if one guy -- in a criminal case, even though one guy might stay home after planning the bank robbery, if another guy goes in and kills somebody, the first guy is chargeable with murder just as much as the people who went there, even though he didn't intend for there to be a murder.

So the idea is that if NASCAR did acts in Kentucky and you're a coconspirator, those acts are charged to you, and that

would meet this systematic activity requirement, if the conspiracy theory applies. And I have to think some more about that. Okay. It's all been enlightening.

MR. CRAIG: Your Honor, could I take 30 seconds to just answer a question? You asked whether there had been any cases that decided whether the general jurisdiction statute could be substituted into the first sentence of Section 12.

THE COURT: Venue statute.

MR. CRAIG: And the answer to that -- first of all, there is. Judge Swinford decided Phillip Gall & Son, 340 F.Supp. 1255. But more recently, the Second Circuit, in the most recent case on that, in a long discussion -- we've cited it. It's Daniel v. The Emergency Board, 428 F.3d 408, and specifically states, "We conclude from the language and context of 'in such cases,' and the service of process provision of Section 12 that the phrase plainly refers to those cases qualifying for venue in the immediately preceding clause."

And they go on to rule that you need to satisfy just that first sentence in Section 12, the venue statute, before you can apply the nationwide service of process provision.

THE COURT: The problem is that the first clause in 22 is narrower than the present federal venue statute.

MR. CRAIG: But the Court in Daniel says -- that is true. The Court recognizes that and says that if you're going to take advantage of the second sentence in Section 12, then you

have to satisfy the first sentence in Section 12.

THE COURT: Okay. I'll take a look at all that. I'll try to get something out.

MR. CHESLEY: Your Honor, could I give one citation, concert of action, Beverly Hills, where that was a civil conspiracy based upon defendants who were part and parcel, a concert of action who never even saw Kentucky. And that's as good as I can get you. That's right here in Kentucky.

THE COURT: That was another theory.

MR. NELSON: The ten-second response to that is that the general statute is different from the statute.

MR. CRAIG: I waive my five seconds.

THE COURT: He couldn't have commented on the 1990 statute. He died in 1974.

MR. CHESLEY: And you took his place.

MR. SINGER: One final point, Your Honor. I think Mr. Susman now recognizes that we did cite the relevant parts and attached the relevant parts of Areeda.

THE COURT: Okay.

MR. CHESLEY: Judge, thank you for your time.

THE COURT: You bet. You'll be hearing from me. I'll make it as quick as I can.

MR. CHESLEY: Thank you, Judge.

(Proceedings concluded at 3:35 p.m.)

C E R T I F I C A T E

I, JOAN LAMPKE AVERDICK, RMR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

JOAN LAMPKE AVERDICK, RMR-CRR Date of Certification

Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

KENTUCKY SPEEDWAY, LLC	:	CASE NO:
	:	
Plaintiff,	:	1:06-mc-00203-KAJ
v.	:	
	:	
NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., ET AL.,	:	
	:	
Defendants.	:	

DECLARATION OF KLAUS M. BELOHOUBEK, ESQ.

Klaus M. Belohoubek, Esq. makes the following declaration pursuant to 28 U.S.C. §1746:

1. I am the General Counsel and Senior Vice President of Dover Motorsports, Inc. ("Dover"), and have held that position since 1999. I make this declaration to put before the Court the facts surrounding Kentucky Speedway, Inc.'s ("Kentucky") past breaches of confidentiality agreements, and the risks and harms involved in allowing Kentucky to have access to any further confidential information from Dover.

2. In my role as General Counsel, I was personally involved in and have personal knowledge of efforts made by Kentucky to gain access to confidential information of Dover and to propose certain potential corporate transactions with Dover in 2004. As a public company, Dover gave full and due consideration to Kentucky's proposals and provided significant confidential information to Kentucky.

3. As is typical when such proposals are made by one entity to another, there was a confidentiality agreement agreed to in advance. Such agreements are used to prevent various improper and potentially harmful disclosures, including disclosure of confidential corporate information such as detailed financial and operating information and business plans, disclosure of information about potential transactions, disclosures which may violate or lead to a violation of securities laws, and disclosures concerning the fact that discussions or negotiations are taking place or even being contemplated. Disclosure of such information can be extremely harmful to Dover from an investor relations standpoint and can be extremely harmful to the company in its relations with employees and in the communities in which it has operations.

4. A copy of the August 26, 2004 Confidentiality Agreement between Dover and Kentucky is attached as Exhibit A. Among other things that agreement provides at ¶2:

> 2. You [Kentucky] and your Representatives [directors, officers, employees . . .] will not . . . disclose to any person the fact that . . . you are

> considering the Transaction or any other transaction involving the Company [Dover] or that discussions or negotiations are taking or have taken place concerning the Transaction or involving the Company or any term, condition or other fact relating to the Transaction or such discussions or negotiations, including, without limitation, the status thereof.

Exhibit A at p. 2.

5. After the Confidentiality Agreement was signed, Dover discovered that Kentucky (through its Chairman, Jerry Carroll) breached the agreement by talking to the press about a potential transaction with Dover. These breaches resulted in several press articles, including the articles from a June edition of the NASCAR Scene and the June 21, 2005 edition of the Herald Leader attached as Exhibit B.

6. Among other things, Kentucky in breach of the Confidentiality Agreement revealed that:

> Kentucky Speedway owner Jerry Carroll said June 18 that the track's ownership group was in negotiations to buy Dover Motorsports, but that the deal has fallen through.

Exhibit B, p1. He went on to tell at least one other reporter in some detail his version of the events involving Dover. See Exhibit B. p. 3. These disclosures violated Kentucky's agreement not to disclose any discussions about a potential transaction, and also its agreement not to disclose the status thereof. See Exhibit A, ¶2. Carroll's statements were also a blatant mischaracterization of the discussions which Dover had had with Kentucky -- discussions which had never progressed to a level of serious discourse due mainly to Kentucky's inability to raise capital.

7. Kentucky's improper disclosures caused (and may have been designed to cause) significant harm to Dover, including creating a misleading impression that Dover was or should be "in play" and harming Dover with investors, analysts, shareholders and employees.

8. On June 24, 2005, upon seeing the article in the NASCAR Scene, I sent the letter attached as Exhibit C to Carroll, as Chairman of Kentucky, notifying him that Kentucky had breached the Confidentiality Agreement and demanding that such breaches stop. After receiving this letter, Carroll called me to apologize for the breach.

9. The making of such improper and inaccurate disclosures at the very highest levels of an organization underscores that Kentucky cannot and should not be trusted with confidential information.

I verify under penalty of perjury that the foregoing is true and correct; I understand that

this verification is made subject to the penalties of 28 U.S.C. §1746 relating to unsworn falsification to authorities.

DOVER MOTORSPORTS, INC.

Executed on: December 12, 2006

By: _____
Klaus M. Belohoubek
General Counsel –
Senior Vice President

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

KENTUCKY SPEEDWAY, LLC	:	CASE NO:
Plaintiff,	:	1:06-mc-00203-KAJ
v.	:	
NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., ET AL.,	:	
Defendants.	:	

EXHIBIT A

Exhibit A to Belohoubek Declaration

DoverMotorsports
INCORPORATED

writer's direct dial: (302) 475-6756
telecopy: (302) 475-3555
email: kbelohoubek@dovermotorsports.com

August 26, 2004

Mark Simendinger
Kentucky Speedway, LLC
2216 Dixie Highway, Suite 200
Ft. Mitchell, KY 41017

CONFIDENTIALITY AGREEMENT

Dear Mr. Simendinger:

In connection with your possible interest in a potential transaction (the "Transaction") with Dover Motorsports, Inc. (the "Company"), you have requested that we or our representatives furnish you or your representatives with certain information relating to the Company or the Transaction. All such information (whether written or oral) furnished (whether before or after the date hereof) by us or our directors, officers, employees, affiliates, representatives (including, without limitation, financial advisors, attorneys and accountants) or agents (collectively, "our Representatives") to you or your directors, officers, employees, affiliates, representatives (including, without limitation, financial advisors, attorneys and accountants) or agents or your potential sources of financing for the Transaction (collectively, "your Representatives") and all analyses, compilations, forecasts, studies or other documents prepared by you or your Representatives in connection with your or their review of, or your interest in, the Transaction which contain or reflect any such information is hereinafter referred to as the "Information". The term Information will not, however, include information which (i) is or becomes publicly available other than as a result of a disclosure by you or your Representatives or (ii) is or becomes available to you on a nonconfidential basis from a source (other than us or our Representatives) which, to the best of your knowledge after due inquiry, is not prohibited from disclosing such information to you by a legal, contractual or fiduciary obligation to us.

Accordingly, you hereby agree that:

1. You and your Representatives (i) will keep the Information confidential and will not (except as required by applicable law, regulation or legal process, and only after compliance with paragraph 3 below), without our prior written consent, disclose any Information in any manner whatsoever, and (ii) will not use any Information other than in connection with the Transaction; provided, however, that you may reveal the Information to your Representatives (a) who need to know the Information for the purpose of evaluating the Transaction, (b) who are informed by you

App. 154

of the confidential nature of the Information and (c) who agree to act in accordance with the terms of this letter agreement. You will cause your Representatives to observe the terms of this letter agreement, and you will be responsible for any breach of this letter agreement by any of your Representatives.

2. You and your Representatives will not (except as required by applicable law, regulation or legal process, and only after compliance with paragraph 3 below), without our prior written consent, disclose to any person the fact that the Information exists or has been made available, that you are considering the Transaction or any other transaction involving the Company, or that discussions or negotiations are taking or have taken place concerning the Transaction or involving the Company or any term, condition or other fact relating to the Transaction or such discussions or negotiations, including, without limitation, the status thereof.

3. In the event that you or any of your Representatives are requested pursuant to, or required by, applicable law, regulation or legal process to disclose any of the Information, you will notify us promptly so that we may seek a protective order or other appropriate remedy or, in our sole discretion, waive compliance with the terms of this letter agreement. In the event that no such protective order or other remedy is obtained, or that the Company does not waive compliance with the terms of this letter agreement, you will furnish only that portion of the Information which you are advised by counsel is legally required and will exercise all reasonable efforts to obtain reliable assurance that confidential treatment will be accorded the Information.

4. If you determine not to proceed with the Transaction, you will promptly inform our Representative, Raymond James and Associates ("Raymond James"), of that decision and, in that case, and at any time upon the request of the Company or any of our Representatives, you will either (i) promptly destroy all copies of the written Information in your or your Representatives' possession and confirm such destruction to us in writing, or (ii) promptly deliver to the Company at your own expense all copies of the written Information in your or your Representatives' possession. Any oral Information will continue to be subject to the terms of this letter agreement.

5. You acknowledge that neither we, nor Raymond James or its affiliates, nor our other Representatives, nor any of our or their respective officers, directors, employees, agents or controlling persons within the meaning of Section 20 of the Securities Exchange Act of 1934, as amended, makes any express or implied representation or warranty as to the accuracy or completeness of the Information, and you agree that no such person will have any liability relating to the Information or for any errors therein or omissions therefrom. You further agree that you are not entitled to rely on the accuracy or completeness of the Information and that you will be entitled to rely solely on such representations and warranties as may be included in any definitive agreement with respect to the Transaction, subject to such limitations and restrictions as may be contained therein.

6. You are aware, and you will advise your Representatives who are informed of the matters that are the subject of this letter agreement, of the restrictions imposed by the United States securities laws on the purchase or sale of securities by any person who has received material, non-public information from the issuer of such securities and on the communication of

such information to any other person when it is reasonably foreseeable that such other person is likely to purchase or sell such securities in reliance upon such information.

7. You agree that, for a period of three years from the date of this letter agreement, neither you nor any of your affiliates will, without the prior written consent of the Company or its Board of Directors: (i) acquire, offer to acquire, or agree to acquire, directly or indirectly, by purchase or otherwise, any voting securities or direct or indirect rights to acquire any voting securities of the Company or any subsidiary thereof, or of any successor to or person in control of the Company, or any assets of the Company or any subsidiary or division thereof or of any such successor or controlling person; (ii) make, or in any way participate in, directly or indirectly, any "solicitation" of "proxies" (as such terms are used in the rules of the Securities Exchange Commission) to vote, or seek to advise or influence any person or entity with respect to the voting of, any voting securities of the Company; (iii) make any public announcement with respect to, or submit a proposal for, or offer of (with or without conditions) any extraordinary transaction involving the Company or its securities or assets; (iv) form, join or in any way participate in a "group" (as defined in Section 13 (d)(3) of the Securities Exchange Act of 1934, as amended) in connection with any of the foregoing; or (v) request the Company or any of our Representatives, directly or indirectly, to amend or waive any provision of this paragraph. You will promptly advise the Company of any inquiry or proposal made to you with respect to any of the foregoing.

8. You agree that, for a period of three years from the date of this letter agreement, you will not, directly or indirectly, solicit for employment or hire any employee of the Company with whom you have had contact or who became known to you in connection with your consideration of the Transaction; provided, however, that the foregoing provision will not prevent you from employing any such person who contacts you on his or her own initiative without any direct or indirect solicitation by or encouragement from you.

9. You agree that all (i) communications regarding the Transaction, (ii) requests for additional information, facility tours or management meetings, and (iii) discussions or questions regarding procedures with respect to the Transaction, will be first submitted or directed to Raymond James and not to the Company. You acknowledge and agree that (a) we and our Representatives are free to conduct the process leading up to a possible Transaction as we and our Representatives, in our sole discretion, determine (including, without limitation, by negotiating with any prospective buyer and entering into a preliminary or definitive agreement without prior notice to you or any other person), (b) we reserve the right, in our sole discretion, to change the procedures relating to our consideration of the Transaction at any time without prior notice to you or any other person, to reject any and all proposals made by you or any of your Representatives with regard to the Transaction, and to terminate discussions and negotiations with you at any time and for any reason, and (c) unless and until a written definitive agreement concerning the Transaction has been executed, neither we nor any of our Representatives will have any liability to you with respect to the Transaction, whether by virtue of this letter agreement, any other written or oral expression with respect to the Transaction or otherwise.

10. You acknowledge that remedies at law may be inadequate to protect us against any actual or threatened breach of this letter agreement by you or by your Representatives, and,

without prejudice to any other rights and remedies otherwise available to us, you agree to the granting of injunctive relief in our favor without proof of actual damages. In the event of litigation relating to this letter agreement, if a court of competent jurisdiction determines in a final, nonappealable order that this letter agreement has been breached by you or by your Representatives, then you will reimburse the Company for its costs and expenses (including, without limitation, legal fees and expenses) incurred in connection with all such litigation.

11. You agree that no failure or delay by us in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

12. This letter agreement will be governed by and construed in accordance with the laws of the State of Delaware applicable to contracts between residents of that State and executed in and to be performed in that State. The parties agree to the exclusive jurisdiction of federal and state courts in Delaware with respect to any disputes hereunder and, for such purposes, consent to jurisdiction and venue in any such courts.

13. This letter agreement contains the entire agreement between you and us concerning the confidentiality of the Information, and no modifications of this letter agreement or waiver of the terms and conditions hereof will be binding upon you or us, unless approved in writing by each of you and us.

Please confirm your agreement with the foregoing by signing and returning to the undersigned the duplicate copy of this letter enclosed herewith.

Very truly yours,

DOVER MOTORSPORTS, INC.,

Klaus M. Belohoubek
Senior Vice President – General Counsel

Accepted and Agreed as of the date first written above:

KENTUCKY SPEEDWAY, LLC

By: _____

Name: MARK F SIMENDINGER

Title: PRESIDENT

KMB/lal
Simendinger, M/001.doc

From the Desk of:
MARK F. SIMENDINGER

8/27/04

Klaus -

As requested. Thanks,

Mark

RECEIVED
AUG 30 2004
LEGAL DEPT.

Kentucky Speedway™

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

KENTUCKY SPEEDWAY, LLC	:	CASE NO:
Plaintiff,	:	1:06-mc-00203-KAJ
v.	:	
NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., ET AL.,	:	
Defendants.	:	

EXHIBIT B

Exhibit B to Belohoubek Declaration

allowing entrance.

MARTINSVILLE SPEEDWAY will host Celebration 2005 on July 1. Gates open at 5 p.m. with carnival rides. The free event will include a concert by Domino and Trick Pony followed

Michigan.

ACTION PERFORMANCE COS. INC. has hired Michael Smith as vice president of mass retail sales. RS

LISA MARIE PRESLEY will perform a pearace concert prior to the July 2 Pepsi 400 at Daytona.

NASCAR Scene

Kentucky Speedway owner still exploring Cup options

BY BOB PockRASS
ASSOCIATE EDITOR

Kentucky Speedway owner Jerry Carroll said June 18 that the track's ownership group was in negotiations to buy Dover Motorsports, but that the deal has fallen through. Carroll said he also has spoken to Dr. Joe Mattioli, who owns Pocono Raceway, and the Bahre family, which owns New Hampshire, about buying their tracks, including talks with Bahre in the last year. Carroll had also talked with the Campbell family when Martinsville Speedway was "not part of" International Speedway Corp.

Nothing has come from those discussions as he continues his attempt to land a Nextel Cup date for his facility located in the Cincinnati area.

Carroll said he has not had discussions with ISC nor Speedway officials with Motorsports Inc., which own most of the tracks where the Nextel Cup Series races.

"We chatted with all of them and never made a lot of headway for whatever reason," Carroll said. "We really made what I thought was major conversations with Dover. We spent a lot of time with Dover and with financial people and for some reason the deal sort of slipped away and was put on hold.

"We were trying every way we could because we're so assured of our market here."

The track had more than 70,000 fans for the June 18 Meijer 300 Busch Series race. It has had five consecutive years of strong attendance for its Busch Series events.

"This thing would cost $250 to $300 million to duplicate today," said Carroll, whose group spent approximately $152 million to build a track that opened in 2000. "It's built. It's ready. We could, within three months, get it to the seating [capacity] of Kansas City or Chicago."

NASCAR officials have consistently said they won't add another race weekend to the Midwest, where it feels it has a solid presence. NASCAR Chairman Brian France has said that the only track that would get a date without having to move one from an existing track would be for New York City.

Carroll suggested that NASCAR give his track the New York City date until that track is built.

"Let us have that date, and when you get ready to go to New York and you build the track, then take the date away from us if we're not performing," Carroll said. "Why waste the date? New York hasn't even started."

He also has toyed with the idea of having a non-sanctioned race with a megaprurse on an off weekend.

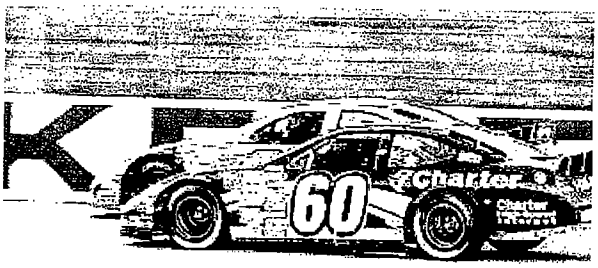
"You either make it happen or you don't," Carroll said. "I get a sense that we haven't said enough. I think we have been too nice. We've been toeing that line trying not to upset anybody." NS

App. 160

Posted on Tue, Jun. 21, 2005

Big-time sympathy for Carroll, and state

RELATED CONTENT



Brian Tietz

Carl Edwards, 60, overtook Greg Biffel in the back stretch for the lead spot early in the 2005 Meijer 300 NASCAR Busch Series race at the Kentucky Speedway in Sparta, Ky. on June 18, 2005.

SPEEDWAY'S BID TO BRING KENTUCKY INTO MAJOR LEAGUES HITS WALL

By Mark Story

HERALD-LEADER SPORTS COLUMNIST

In some ways, being a sports fan in Kentucky just stinks.

Sure, in some senses, we're lucky.

In the Kentucky Derby, we're home to a genuinely unique sporting event of international scope.

Outside of Notre Dame football, there may be no college athletics program in any sport whose magnitude exceeds University of Kentucky basketball.

From the time of Denny Crum, the University of Louisville has consistently fielded a basketball team worthy of UK's and given our state a sizzling rivalry.

Heck, there are even signs that the U of L of Tom Jurich may give the commonwealth what UK has not provided since the days of Blanton Collier: A consistent winner at a high level of Division I-A football.

But what our state has consistently lacked is someone with the daring and the vision -- and the access to cash -- to get Kentucky a spot in the real big time of American sport:

The pros.

(I know the NBA is in bad odor with many, but it's a five-alarm shame that a state with our basketball heritage is not involved in pro basketball at the highest level.)

All of which brings me to **Jerry Carroll** and Kentucky Speedway.

As a rule, I don't expend a lot of sympathy on multi-millionaires, but I find myself feeling sorry for Carroll.

It's been six years now since he and his well-heeled investor group turned a Gallatin County cow pasture into a $150 million-plus motorsports palace with the ultimate goal of bringing a NASCAR Nextel Cup race to the commonwealth.

For once, our state had someone who was willing to dream on an epic scale and even put up private money to make it happen.

In between then and now, Carroll and Co. have promoted the heck out of their Speedway; in a spotty economy, they have attracted corporate sponsors for all their races; have sold out five straight NASCAR Busch Series (think Class Triple-A) events; even installed state-of-the-art SAFER barriers to aid driver safety.

Done, in other words, about everything right that can be done.

Yet, they still seem no nearer the goal of bringing the coveted Cup date to the commonwealth than on that rainy night when Kentucky Speedway opened back in 2000.

"We're sitting here competing our butts off," Carroll said Saturday night, during the early stages of what became a Carl Edwards victory in the Busch Series Meijer 300 Presented by Oreo.

"And we're totally ignored by the powers-that-be at NASCAR. The frustration mounts and mounts and mounts."

So now, Carroll says the time "for trying" to get a Cup race is done; "now is the time for doing," he says.

Yet, he acknowledges there "really aren't that many options" for doing.

One that Carroll mentioned Saturday night was the possibility of running an "independent" race, one outside of NASCAR's purview.

Meaning?

"You're not sanctioned," Carroll said. "You invite the drivers. You put up a purse and

App. 162

get a race."

Problem with that, even if you put up the largest purse in the history of American motorsports, can you imagine Jeff Gordon or Dale Earnhardt Jr. (or for that matter, Ford, Chevrolet or Dodge) risking the wrath of NASCAR to run?

Me neither.

So, this being America, 2005, there's also the possibility of retaining an attorney and going to court.

It was lost on no one in motorsports that Bruton Smith's Texas Motor Speedway only got a second Cup date after a track shareholder filed an anti-trust suit against NASCAR.

(Both the sanctioning body and the International Speedway Corporation, a public company that owns 13 of the 22 racetracks that currently have Cup dates, are controlled by the France family.)

Carroll declined to discuss that subject Saturday.

"I can't go into that; I can't go into that," he said.

It is widely believed that NASCAR has two Cup dates more or less parked that will go to new tracks ISC hopes to build in the New York City and Seattle/Portland, Ore., markets.

"They're saving a date to go to New York; everyone knows that," Carroll said. "And they're saving a date to go to Oregon or Washington.

"Three years ago, we said to NASCAR, 'Hey, you're saving that date. Let us have that date, let us run some Nextel Cup. By the time you get your speedway built, if we're not hitting a grand-slam home run, take it back.'"

That went nowhere, Carroll said.

Two years ago, Bill France Jr. -- patriarch of the France family -- publicly spoke of the possibility of Kentucky Speedway perhaps getting a Cup date from another of the "independent" tracks that already have one.

Carroll said Kentucky Speedway interests subsequently held talks with the respective ownerships of four tracks: **Dover**, Del.; Pocono, Pa.; New Hampshire; and Martinsville, Va., (before the latter track was sold to ISC).

The discussions went the deepest with **Dover**, he said.

App. 163

"We have visited the tracks and tried to see where we could fit in," Carroll said. "See if we can't, basically, make a deal. That's what I like to do. But nothing materialized."

At least one financial adviser who works in the motorsports sector says he fears no Cup date is likely to ever materialize at Kentucky Speedway.

"You never say never," says Chicago-based Tim Frost. "But it looks very, very difficult. And it's a shame. Because **Jerry Carroll** and his people have done a really good job in so many ways."

Which, as I said, is why I feel sorry for Carroll.

As well as for those of us who, in a pro sports context, would like to see Kentucky go big-time in *something*.

Reach Mark Story at 859-231-3230, 800-950-6397 (Ext. 3230) or at mstory@herald-leader.com.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

KENTUCKY SPEEDWAY, LLC	:	CASE NO:
	:	
Plaintiff,	:	1:06-mc-00203-KAJ
	:	
v.	:	
	:	
NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., ET AL.,	:	
	:	
Defendants.	:	

EXHIBIT C

Exhibit C to Belohoubek Declaration

DoverMotorsports
INCORPORATED

writer's direct dial: (302) 475-6756
telecopy: (302) 475-3555
email: kbelohoubek@dovermotorsports.com

via facsimile (859) 647-4307
and Federal Express

Jerry Carroll
Chairman
Kentucky Speedway, LLC
2216 Dixie Highway, Suite 200
Ft. Mitchell, KY 41017

Re: ***Breach of Confidentiality Agreement***

Dear Mr. Carroll:

I would like to remind you that you and Kentucky Speedway are bound by the terms of a confidentiality agreement dated August 26, 2004.

As is customary with such agreements, the terms of your confidentiality agreement extend to even mentioning the fact that discussions with us took place.

For you to refer to our preliminary discussions as "major" and refer to a "deal" that slipped away is a gross mischaracterization. For you to have such a dialogue with members of the press violates both the spirit and the letter of our agreement. Your comments were extremely damaging to Dover Motorsports and we are now in the position of having to explain your comments to investors, analysts, shareholders and employees.

We entered into a confidentiality agreement for a reason and we expect that you and Kentucky Speedway will honor the terms of that agreement.

Thank you.

Very truly yours,

Klaus M. Belohoubek
Senior Vice President-General Counsel

KMB/lal
Carroll, J/001.doc

App. 166

Transmission Report

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Local ID 2			Local Name 2

This document : Confirmed
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Document size : 8.5"x11"

Confidential
Attorney-Client Privileged Communication

From:

Klaus M. Belohoubek, Esq.
Senior Vice President-General Counsel
Direct Dial: 302-475-6756
Fax: 302-475-3555
Email: kbelohoubek@dovermotorsportsinc.com

Date: 6/24/05

To: Terry Carroll

Fax Number: (859) 647-4307

Number of Pages including Cover Sheet: 2

Please call Lynda Lee at 302-475-6757 if you have not received the number of pages indicated or if there is any other problem in the transmission of this fax.

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Abbreviations:
HS: Host send
HR: Host receive
WS: Waiting send
PL: Polled local
PR: Polled remote
MS: Mailbox save
MP: Mailbox print
CP: Completed
FA: Fail
TU: Terminated by user
TS: Terminated by system
RP: Report
G3: Group 3
EC: Error Correct

App. 167